JD-10-10
Williamstown, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NORTHERN BERKSHIRE COMMUNITY
SERVICES, INC. d/b/a SWEET BROOK
TRANSITIONAL CARE AND LIVING CENTERS

and Case 1—CA—45210

1199 SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS EAST

Jo Anne P. Howlett, Esq., for the General Counsel.
Steven M. Swirsky, Esq., and *Phillip H. Wang, Esq.,*
of New York, New York, for the Respondent.
Alfred Gordon, Esq., of Boston, Massachusetts, for
the Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in North Adams, Massachusetts, on September 22—24 and November 3—5, 2009.[1] The charge was filed February 27, 2009.[2] This charge was amended and the complaint issued on June 30. At the beginning of the trial, I granted counsel for the General Counsel's oral motion to further amend the complaint by changing the date of the alleged misconduct described in paragraph 9(a) and by altering a reference in paragraph 9(b). See Tr. 16—17.

The complaint alleges that the Employer, Northern Berkshire Community Services, Inc., d/b/a Sweet Brook Transitional Care and Living Centers (Sweet Brook), engaged in a variety of unlawful acts during the course of an organizing campaign among its work force conducted by the 1199 Service Employees International Union, United Healthcare Workers East (the Union). Specifically, the General Counsel alleges that Sweet Brook implemented an overly broad

[1] The Board's judges regularly hear cases in Federal, State, and local courthouses. I conducted this trial as a guest of the Northern Berkshire District Court. I can confidently state that no traveling judge has ever received more gracious and friendly treatment than I experienced there. The citizens of western Massachusetts should take justifiable pride in the conduct and professionalism of the entire staff of their local court. I wish to extend my particular thanks to the judge of that court, the Hon. Michael Ripps.

[2] All dates are in 2009 unless otherwise indicated.

solicitation policy in response to union activity; promulgated an overly broad distribution policy; engaged in surveillance and the creation of an impression of surveillance of employees' activities; and interrogated, coerced, intimidated, and impliedly threatened its employees in violation of Section 8(a)(1) of the Act. In addition, the General Counsel contends that Sweet Brook committed an act of unlawful discrimination against its employee, Elise Martin, by refusing to permit her to withdraw her notice of resignation because of her union activities and in order to discourage its employees from engaging in such activities in violation of Section 8(a)(3) and (1) of the Act. The Employer's answer to the complaint denied the material allegations of wrongdoing and raised various defenses.[3]

For the reasons described in detail in this decision, I find that the Employer did engage in certain conduct that interfered with, restrained, and coerced its employees in their exercise of the rights guaranteed in Section 7 of the Act. This conduct violated Section 8(a)(1) of the Act. With respect to other conduct alleged to violate the same subsection, I have concluded that the General Counsel failed to meet his burden of proof. As a consequence, I will recommend that those allegations be dismissed. I further find that the Employer did discriminate against Martin by refusing to permit her to withdraw her resignation based on her union sympathies and activities in violation of Section 8(a)(3) and (1) of the Act.

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Employer, a corporation, provides rehabilitative and skilled nursing care to residents at its facility in Williamstown, Massachusetts, where it annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $5000 directly from points outside the Commonwealth of Massachusetts. The Employer admits[5] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, a health care institution as defined in Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

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[3] Among the Employer's stated defenses was an assertion that all or part of the allegations in the complaint were barred by the statute of limitations contained in Sec. 10(b) of the Act. The Employer did not address this defense at trial or in its brief. As a result, it has been waived. *Wisconsin Bell,* 346 NLRB 62, fn. 8 (2005). Furthermore, examination of the chronology of events and the filing dates of the charges related to those events demonstrates that the defense lacks merit.

[4] The transcript of the proceedings is generally accurate. During the second week of trial, the lawyers and I made certain corrections to the first portion of the transcription. See Tr. 613—616. As to the second week, two corrections are required. At p. 1112, l. 25, "Gulutea" should be "Gulotta." At p. 1236, l. 24, "candles" should be "panels." Any remaining errors are not significant or material.

[5] See pars. 6 and 7 of the Employer's answer to the complaint. (GC Exh. 1(k).)

1. The background

Sweet Brook is a residential care facility that employs approximately 200 people. Its residents fall into two broad categories, those admitted for relatively short stays for purposes of rehabilitation and permanent residents who are suffering from chronic impairments such as dementia. While the facility is housed in a single building, there are various units within that structure. These units include Dorothy Hickey (DH), used primarily for short term rehabilitation, as well as, Collier-Wright (CW) and Linden Court, units designed to provide long term care. Linden Court is subdivided into components named Baxter and Davis.

During the period at issue, Sweet Brook's administrator was Susan Gancarz. In addition, Gancarz served as vice president for continuing care services for the parent organization, Northern Berkshire Community Services. Her office was physically located at Sweet Brook. Subsequent to the events involved in this case, Gancarz transferred to a position as Northern Berkshire's director of projects and planning. She continues to serve in that role.

Serving in key supervisory positions under Gancarz' direction during the events in controversy were Cindy Dix, the director of nursing, Nora Whitney, assistant director of nursing, and Sharon Moresi, director of human resources. Dix left Sweet Brook's employ in October 2009 in order to return to school.[6] Whitney left Sweet Brook's employ in the final months of 2008. Moresi assumed the duties of director of human resources on December 8, 2008, replacing Kathy Denault. Prior to that time, she had been employed in an administrative position handling payroll and benefits. She was formally promoted to the human resources directorship in January 2009 and continues to hold that position.

Apart from these key management officials, several other supervisors played a role in the events that must be addressed in this case. Linda Card is currently the director of admissions for Sweet Brook. During the period at issue, she served as the nurse manager of the CW Unit and the admission coordinator for the entire facility. Another unit manager whose activities figure in this trial was Linda Sherman. Sherman is no longer employed by Sweet Brook and did not testify at trial. Terri Willard also served as a nurse supervisor during this period. Finally, Wendy Kelly serves as a scheduler, a supervisory position within the meaning of the Act.[7]

During the course of the trial, there was considerable controversy about the Employer's staff handbook. The discussion centered on the question of which version of that handbook was actually in effect during the period under examination. A review of the evidence on this question demonstrates that the handbook that governed the conduct of employee relations during these events was the edition that was written in 1997 and revised in March 2008. That version was authenticated by Moresi and admitted into evidence as GC Exhibit 7. Some confusion arose from the fact that a later version of the handbook does exist. That revision is dated October 2008. Moresi and Gancarz testified that the October 2008 draft was never implemented or issued to any employees. It remains in draft form, subject to further review by

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[6] Although Dix was a key figure in several of the events at issue in this case, the Employer chose not to call her as a witness in this proceeding. I will discuss the significance of this later in this decision.

[7] The Employer does not dispute the supervisory status of the management personnel alleged to have engaged in wrongdoing in this case. See, answer to the complaint at par. 8. (GC Exh. 1(k).)

upper management. I find that counsel for the Employer is correct in stating that, "[t]he handbook in effect during all relevant periods to the Complaint is the March 2008 Handbook." (R. Br. at p. 27, fn. 20.) The October 2008 draft is only relevant in so far as it illuminates management's evolving thought process as to issues under scrutiny in this case.

The staff at Sweet Brook is not represented by a union. Management's position regarding this question is clearly described in the handbook. It explains the Employer's policy on unions as follows:

> In our opinion, a union would impair efficient operation of the organization and our ability to deliver quality care and services to our residents. It would hurt the business on which we all depend for our livelihood. We believe that unions are not necessary at Sweet Brook. We do not want a union here, and we will use every legal means to keep our facility free from unions. [Underlining in the original.]

(Handbook, GC Exh. 7, p. 111.)

In the latter months of 2008, the Union initiated an organizing campaign among the employees of Sweet Brook. Two of its organizers, Peter Hasegawa and Phoebe Rollins, were assigned primary responsibility to manage this effort. As part of the campaign, an organizing committee was created. One member of that committee, Elise Martin, figures prominently in the events of this case. Martin was first hired by Sweet Brook in 2002. She served as a certified nursing assistant (CNA). As will be discussed later in this decision, Martin's service with Sweet Brook over the following 7 years was somewhat intermittent. However, she was employed as a CNA at the facility on a continuous basis from April 2007.

Martin testified that she attended her first union meeting in November 2008. Apart from her service on the organizing committee, she attended all meetings, discussed the campaign with fellow employees, and distributed union literature to those employees in the parking lot, breakroom, and at the nurses' station.

On January 7, the Union filed a petition with the Regional Director, seeking a representation election at Sweet Brook. Later in the month, the parties participated in a lengthy representation hearing. Subsequently, an election was scheduled for March 26. The parties agree that the election was never held because the Regional Director determined that the Board's longstanding general policy of refusing to continue to process representation petitions when unfair labor practice charges are pending should apply to this situation. *U.S. Coal Co.,* 3 NLRB 398 (1937). Since the conclusion of the trial in this case, the Regional Director has approved the Union's request to withdraw its representation petition without prejudice.[8]

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[8] I include this information regarding the withdrawal of the representation petition at the request of counsel for the Employer who filed a motion for this purpose. I do not agree with his contention that this information constitutes grounds to reopen the record to receive newly discovered evidence. Under the Board's standards, the information does not qualify for such treatment as it is not such evidence "that if adduced and credited it would require a different result." *APL Logistics, Inc.,* 341 NLRB 994 (2004), enf. 142 Fed. Appx. 869 (6th Cir. 2005). However, I agree with counsel that it is nevertheless appropriate to take administrative notice of the Regional Director's action. See *Benson Wholesale Co.,* 164 NLRB 536, 537 (1967) (Board adopts judge's decision taking "official notice" of the contents of the Regional Director's

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2. Events during the organizing campaign

Contemporaneously with its filing of an election petition, the Union issued a flyer for distribution at Sweet Brook. It announced the Union's "formal request for a secret ballot union election" and asserted that it had obtained authorization cards from "*nearly three quarters*" of the employees. (GC Exh. 2.) (Italics in the original.) This flyer was notable in that it contained the photographs of five union supporters accompanied by their names and a prounion quotation from each. Among the group of five was Martin. Underneath her photograph, she was quoted as saying, "I want a union because I want to be treated with respect." (GC Exh. 2.)

Kim Carmain, a former employee at Sweet Brook, testified that she distributed copies of this flyer. She also observed copies placed at a nurses' station in the CW unit of the facility. In fact, she saw Unit Manager Card pick up one of the copies at the nurses' station. In addition, Moresi testified that she "[p]robably" saw the flyer containing Martin's photograph.

Apart from this flyer bearing Martin's photograph, the Union issued numerous other campaign materials that were distributed among the work force.[9] Some of these documents were distributed at nurses' stations. This provoked a negative response from management. For example, Melinda Gulotta, a former CNA at Sweet Brook, testified that early in the Union's campaign, she was present at the Baxter nurses' station along with Assistant Director of Nursing Whitney. Gulotta provided uncontroverted testimony that Whitney, "picked up a union flyer and handed it to me and told me, it couldn't be at the nurses' station." (Tr. 496.)

Controversy about the distribution of union literature intensified during the month of February. Martin testified regarding an incident that took place at the Baxter nurses' station. When she reported to work at 7 a.m. on the day in question, she observed a stack of union flyers that had been placed on the desk at the station. They remained there until approximately 9:30 to 10 a.m. At that time, Unit Manager Sherman confiscated them. Martin asked her why they were being removed, observing that management also distributed its own flyers. Sherman responded, "Sweet Brook is Sweet Brook and the Union is the Union." (Tr. 107, 217.)

Later that day, Martin observed another employee, Brittany Maxwell, bring more flyers to the nurses' station. Maxwell taped one of them to a vertical portion of the nurses' station desk where it would be visible to persons seated at the desk but could not be seen by individuals located outside the nurses' station.[10] Thereafter, Sherman arrived at the station, observed the posted flyer, and departed. She returned a few minutes later, accompanied by Director of Nursing Dix. Dix confiscated the flyer and ordered Martin to report with her to Dix's office.

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representation case file in a related matter).

[9] This was matched by similar activity from management. Kathleen Wilton, a retired unit assistant, testified that management "very often" handed out flyers opposing the Union and held one-on-one meetings with employees for the same purpose. (Tr. 562.)

[10] Gancarz testified that she was told by Dix that the flyer had been "displayed on the glass" that separated the nurses' station from the hallway used by residents and outsiders. (Tr. 1166.) There was no eyewitness testimony that supported this contention. Martin's description of where she actually saw the flyer being posted is partially corroborated by the Employer's own photographic evidence. R. Exh. 13, p. 5, consists of a photograph of the nurses' station that clearly shows the existence of the vertical portion of the desk with numerous postings on it. It is clear from this view that Martin's description of the union flyer's location would limit its visibility to those inside the nurses' station in precisely the manner she described.

Once there, Dix instructed Martin that "it was unacceptable to hang flyers in the nurses' desk." (Tr. 111.) When Martin protested that she had not done so, Dix replied that, "Well I assumed it was you." (Tr. 111.) Dix advised Martin that it was only permissible to distribute flyers in the employees' breakroom. She added that, "[i]f I see anyone doing it again they will be reprimanded." (Tr. 111.)

Martin's testimony regarding these events at the Baxter nurses' station was uncontroverted. In addition, it was significantly corroborated by Gancarz who testified that Dix informed her that she and Sherman had removed flyers from the nurses' station. Gancarz added that she subsequently "spoke with staff that they should not display those flyers at the Nurse's Station for residents and families to see." (Tr. 1166.) While Gancarz was not an eyewitness, her account clearly confirms that the events occurred. As to the precise manner in which they occurred, I find Martin's testimony to be credible as it is not only undisputed, but also consistent with photographic evidence and considerable additional testimony regarding the Employer's practices as to this issue.[11]

Both Martin and Gulotta testified that shortly after the Union's supporters began distributing their literature the Employer posted no-soliciting signs on the doors of the facility. This represented a new initiative by Sweet Brook as no such notices had previously been posted on the premises. Indeed, both Martin and Gulotta opined that they had not heard of any solicitation policy prior to this posting. Their testimony was further corroborated by that of another former CNA at Sweet Brook, Carmain. She reported that the no-soliciting signs were posted on the doors, "[w]ithin days after our first Union flyer was distributed." (Tr. 687.) Although she had worked at the institution continuously since 2001, she had never seen such signs before.

Definitive insight into the Employer's newly implemented decision to post no-soliciting signs was provided through the testimony of Jeffrey Gulotta.[12] He is currently employed in the maintenance department at Sweet Brook. He reported that he personally observed his supervisor, Steve Gengris, give a fellow maintenance worker, Keith Hewitt, signs to be posted on the doors. He testified that this occurred "after all this stuff started." (Tr. 649.) He explained that his reference was to the Union's organizing campaign. He also reported that he witnessed Hewitt put one of the signs on the fire door of the DH Unit. Finally, Gulotta identified GC Exhibit 20 as a photographic representation of one of the posted signs. That exhibit shows a sign bearing the legend, "NO SOLICITING."

On Saturday, February 21, the Union staged a campaign event that it referred to as "Sticker Day." Hasegawa stationed himself in the Sweet Brook parking lot and distributed stickers for union supporters to wear while on duty at the facility on that day. The stickers were purple in color and were described as being of button size (approximately 2 inches in diameter). They contained the logo for SEIU, Local 1199. They also bore the slogan, "Be fair to those who care." Some union supporters also wore other insignia such as lanyards and bracelets.

The weekend nurse manager on duty that day was Linda Card. Her behavior on Sticker Day is a source of controversy. Martin testified that she was on duty and wearing a sticker. She described Card as, "walking around with a clipboard looking at all of us. I noticed her

[11] For example, Kelly Miller, another former CNA employee, testified that shortly after the election petition was filed management "put notices up saying that we couldn't post any flyers that were pro-union." (Tr. 56.)

[12] Gulotta is married to Melinda Gulotta.

glancing at the sticker and writing something down and she would walk away." (Tr. 121.) Martin clarified that, as Card passed her, "she looked down at my sticker, wrote something down and walked away." (Tr. 121.) Martin added that it was not normal to observe Card carrying a clipboard.

Melinda Gulotta also testified regarding Card's behavior. She reported that she obtained a sticker from Martin and was wearing it while she and a colleague were feeding a resident in the Baxter day room. Card, "peeked her head in and looked at us and wrote on her clip board; said good morning and went on about her way." (Tr. 501.) Gulotta characterized Card's behavior as "very unusual." (Tr. 502.)

Card, herself, reported that after she arrived at work that day she went to the CW unit. At the desk area, she encountered CNA Theresa McClain who was wearing one of the stickers. Card testified that she asked McClain, "What's that on your uniform?" (Tr. 1208.) McClain responded that it was a sticker that another employee "slapped on me." (Tr. 1208.) Upon hearing this, Card then asked what the sticker said. McClain responded by repeating the wording of the sticker to Card. Card indicated that she resumed making her rounds of the institution and observed other employees wearing the stickers. She did not discuss the matter with any of those employees.

At this point, Card returned to her office and sent an e-mail to Administrator Gancarz. She informed Gancarz that it had been reported to her that Hasegawa had been in the parking lot and had provided stickers to Brittney Maxwell. Card went on to describe the contents of the stickers and asked if, "you want me to ask the staff who are wearing them to remove them." (GC Exh. 17.) She suggested that Gancarz telephone her. In response to Card's inquiry, Gancarz did call her and "asked if I knew the Staff Members who were wearing them, which I did know. And if I could keep a—write them down on a piece of paper—identify who they were." (Tr. 1211.) Card further reported that,

> [W]e were asked just to review with the Staff Members that [it] was their right to wear the sticker, but what message does that send to our residents and to our family members about the Employees who are not wearing the stickers? Does that mean because I'm not wearing a sticker that I don't care for my residents and that I'm not fair?

(Tr. 1216—1217.) Interestingly, while Gancarz corroborated Card's testimony that she telephoned her on Sticker Day, she did not confirm Card's account of the details of that conversation. While Gancarz agreed that she instructed Card that the employees were allowed to wear the stickers, she contended that this instruction was "the gist of the conversation." (Tr. 1170.) She omitted any reference to a directive to interrogate the employees about the "message" that the stickers were sending to "our residents and to our family members." (Tr. 1216—1217.) She also omitted any reference to the creation of a list of sticker wearers.

In resolving this rather telling conflict between the versions provided by the two supervisors, I credit Card. As to the directive to confront employees regarding the "message" they were sending I can conceive of no reason why Card would invent such an instruction, particularly since it happens to be a rather bizarre one. Given that it makes little sense to suggest that the slogan, "Be fair to those who care," creates an inference that employees who do not support the Union are indifferent to the needs of their patients, it likely represents a

hasty, off-the-cuff, reaction to the news being conveyed by Card.[13] I find Card's account to be a credible depiction of Gancarz' immediate response to the news about Sticker Day.

My conclusion in this regard is reinforced by the other matter that was omitted in Gancarz' testimony about her discussion with Card. As to that matter, the order to create a list of sticker wearers, Card's testimony is undoubtedly accurate because it is compellingly corroborated by contemporaneous documentary evidence. That evidence shows that Card sent a second e-mail to Gancarz on Sticker Day. The e-mail tells Gancarz that, "[t]he employees who have chosen to wear the stickers are . . . ." (GC Exh. 15.) This is followed by a list of 16 names of employees.[14] The e-mail concludes with Card's observation that, "I will keep a list of any one else that I notice." (GC Exh. 15.) I find it entirely likely that Card would send such a list to Gancarz in response to an order to do so, rather than as a spontaneous act. This is particularly the case where it is undisputed that Card had made a written request for instructions and Gancarz had telephoned her in response to that request. As a result, I conclude that Gancarz instructed Card to take two steps in reaction to Sticker Day. The first step was to compile a list of sticker wearers. The second instruction was to confront the sticker wearers regarding the "message" that they were choosing to send to others.

There remains one further issue that needs to be resolved regarding the events on Sticker Day. It will be recalled that employees testified that Card made a highly visible point of noting the identities of the sticker wearers while writing on a clipboard. By contrast, Card disputed this. She testified that she created the list in her office based entirely on her recollection of whom she had observed wearing the stickers. She claimed that she did not rely on any prior written notations.

In this instance, I do not credit Card's testimony.[15] In the first place, I agree with counsel for the Union's assessment, expressed as follows:

> Card's suggestion that she acted normally while among the employees and did not write down the names as she saw the stickers defies common sense and credulity. As an initial matter, the employees specifically remember her writing something down immediately after looking directly at their

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[13] I note that there is nothing troubling about the slogan printed on the stickers. It is clear to me that the wording is a gentle exhortation to management to improve the terms and conditions of employment for Sweet Brook's caregivers. As such, it does not raise the concerns cited by the Board in *Sacred Heart Medical Center,* 347 NLRB 531, 532 (2006), remanded 526 F.3d 577 (9th Cir. 2008) (employer demonstrated special circumstances supporting prohibition of buttons that read, "RNs Demand Safe Staffing," because those buttons sent "a clear message to patients that their care is currently in jeopardy.")

[14] Among the named employees were Martin and Melinda Gulotta.

[15] I recognize that I have accepted other aspects of Card's account as true. As the Board has observed, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *Amber Foods, Inc.,* 338 NLRB 712, 715, fn. 13 (2002), quoting Chief Judge Learned Hand in *NLRB v. Universal Camera Corp.,* 179 F. 2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). In this particular instance, it is relatively easy to understand why portions of Card's account are more reliable than other parts. When Card was relating the behavior of others, she did not feel a need to be defensive. However, when her own conduct in making the list of sticker wearers was under direct scrutiny, she reacted in a decidedly less candid manner.

> stickers. And the sheer number of names on her list . . . makes it exceedingly unlikely that Card remembered all the names of people she noticed throughout her rounds and wrote the names down when she returned to her office.

(CP Br. at p. 6.)

This analysis is reinforced when one examines GC Exhibit 16. That document is a hand written list of the sticker wearers created by Card.[16] The employees' names are written down in the precise order that they were later included in Card's e-mail to Gancarz. Given that Card created two identical lists of the names it appears far more plausible that she made the hand written list while on her rounds and the computerized list when back in her office. The suggestion that she sat at her desk and laboriously hand wrote the list and then typed the identical list into her computer appears both illogical and inefficient. Instead, I accept the credible testimony of the employees who observed her behavior on that day.

After Sticker Day, the Union intensified its activities. On February 27, it filed the initial charge in this case alleging that Dix's warning to Martin regarding the posting of flyers in the nurses' station was an unfair labor practice. (GC Exhs. 1(a) and 6.) Early in the morning of the next day, Hasegawa returned to the Sweet Brook parking lot in his automobile with the purpose of delivering some union flyers to Melinda Gulotta. He testified that he spotted Gulotta and bent over to pick up the leaflets. At that moment, "I looked up and Sharon Moresi was in my window." (Tr. 392.) He called to Gulotta and attempted to give her the flyers. Moresi stationed herself so as to block this attempt. He told Moresi that, "I'm just trying to give these leaflets to Mindy." (Tr. 393.) Hasegawa reported that Moresi responded, "[N]o, I'm not going to let you give the leaflets to Mindy. No you can't do that." (Tr. 395.) At that point, Hasegawa attempted to maneuver his car in order to evade Moresi's blocking action. Moresi shifted her position to maintain her stance between Hasegawa and Gulotta. Ultimately, Hasegawa left the parking lot without giving the materials to Gulotta. Both Gulotta and Moresi also described this incident. All three accounts were entirely consistent in depicting the event.

In the first week of March, management took actions to address the Union's most recent activities, the filing of the unfair labor practice charge and the attempted distribution of literature from Hasegawa to Gulotta. As to the first matter, Martin testified that she was on duty at approximately 3 p.m. when Moresi approached her and asked to speak with her. They went into the hallway and Moresi showed her the unfair labor practice charge describing Dix's reprimand of Martin and identifying Martin by name. Martin testified that Moresi, "asked me if I had ever seen it." (Tr. 116.) Martin responded that she had not seen it before.[17] Moresi then observed, "[W]ell, your name is on it." (Tr. 116—117.) At this, Martin began to cry. Moresi told her, "don't worry, Cindy's not mad at you . . . . We know it's the union that's doing this, not you." (Tr. 118.) Moresi's reference was to Director of Nursing Cindy Dix. Finally, Martin reported that Moresi addressed her on this same topic later in the day. As Martin was leaving the building at the end of her shift, Moresi stopped and "asked if I was okay." (Tr. 234.) Martin responded affirmatively.

Moresi's own description of these events is essentially the same. She confirmed that

[16] The document also contains dots placed next to three of the employees' names on Card's list. In her testimony, Card explained that she put the dots next to those names, "[b]ecause I was surprised of those people wearing them—the sticker." (Tr. 1214—1215.)

[17] Hasegawa testified that he had neglected to show Martin the charge before filing it.

she approached Martin at the nurses' station and asked, "if she had a moment." (Tr. 804.) The two then went down the hall together and Moresi showed Martin the unfair labor practice charge in which she was named. She asked Martin, "Elise, do you know this?" (Tr. 804.) Martin replied, "I hate that f'ing Union. I can't believe they did this without telling me." (Tr. 804.) She then, "burst into tears." (Tr. 804.) Moresi told her to calm down. After a few minutes, Martin regained her composure, "but she was still upset." (Tr. 804.) Moresi also confirmed that she approached Martin a second time about the matter. In that instance, she asked if Martin were "okay," and Martin told her that she was "fine." (Tr. 805.)

One aspect of Moresi's testimony about these events requires further comment. I inquired of Moresi why she had chosen to broach the subject of the unfair labor practice charge with Martin. Moresi replied that her purpose was, "[t]o make sure that she was okay. I had heard that she was upset." (Tr. 805.) I reject this attempt to propose a benign or even friendly purpose for Moresi's questioning of Martin about the charge. I find it incredible that Moresi would have somehow heard that Martin was upset about the matter. The uncontroverted testimony is that Martin was entirely unaware of the filing of the charge containing her name until the moment when she was shown the document by Moresi herself. That testimony is amply supported by Martin's shocked reaction when Moresi raised the subject with her. I conclude that Moresi's purported justification for addressing the topic with Martin is simply a rather lame effort to put a better face on her own conduct.

Management's second response to the recent union organizing activity was to write a letter to Hasegawa regarding the parking lot encounter between him and Moresi. The letter was dated March 6, and signed by Gancarz. It was addressed to Hasegawa at an office maintained by the Union in Dorchester. It made specific reference to his confrontation with Moresi and characterized his behavior as, "nothing more than common trespass." (GC Exh. 9.) Gancarz expressed the Employer's responsibility for the safety of residents and concluded the letter with the following sentence:

> For this reason—and given the high value your organization says it places on "respect" for the rights of others[18]—I expect you to refrain from being on Sweet Brook's property again between now and the National Labor Relations Board election scheduled for March 26th.

(GC Exh. 9.) Gancarz testified that she sent the letter by certified mail. She reported that she never distributed the letter among the rank-and-file employees, nor did she direct other managers to do so. Nevertheless, she conceded that she did distribute copies of the letter to the "Management Team" at a morning management meeting.[19] (Tr. 1192.) She thought that the meeting in question occurred on March 7, the day after she mailed the letter to the Union's office in Dorchester.

Hasegawa reported that he did not receive the letter because he visited the Union's offices in Dorchester only infrequently. He first learned about the letter from Sweet Brook

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[18] Gancarz' rather sarcastic reference to the concept of "respect" is certainly suggestive. It will be recalled that the union flyer announcing the representation petition quoted Martin as desiring a union, "because I want to be treated with respect." (GC Exh. 2.)

[19] Gancarz noted that it was routine to pass out campaign materials to managers at these meetings for distribution by them to the rank-and-file employees. However, she observed that such materials intended for further dissemination were provided in batches, whereas the letter to Hasegawa was given out in single copies.

employees. Only after hearing about it from them did he obtain a copy from the office in Dorchester. Hasegawa testified that he never distributed the letter to any employees. He did acknowledge that it was possible that he and Rollins may have brought a copy of it to union meetings held approximately a week later.

While neither Gancarz nor Hasegawa testified that they distributed or directed the distribution of the letter to rank-and-file employees, the fact remains that it was available at the facility for those employees to read. For example, Carmain testified that she discovered a copy of the letter on her desk. After reading it, she telephoned Hasegawa and told him, "I can't believe that letter that they sent to you." (Tr. 696—697.)

While Carmain's testimony, standing alone, does not establish how the letter was made available to her, much more direct testimony was provided by Jeffrey Gulotta. Gulotta reported that management maintained a bulletin board for the maintenance department employees. The board was divided into sections for each member of the department. On one day in March, a copy of Gancarz's letter to Hasegawa was posted in each section of the bulletin board. His own copy contained his name written on the upper corner. Gulotta testified that he recognized the handwriting as belonging to his supervisor, Gengris.

As may be expected, the upcoming election continued to be a topic of discussion during this period. On March 12, Gulotta was in the Baxter day room feeding a resident. Unit Manager Sherman entered and engaged Gulotta in conversation. She informed Gulotta that she was particularly busy since she was required to supervise two units due to a vacant position. She added that the Employer was thinking about selecting a nurse named Simi Norilla to fill that opening. According to Gulotta, Sherman then observed that "they wouldn't hire Simi because they felt that would take a vote away from you guys." (Tr. 511.) Gulotta responded that this made no sense because Norilla was opposed to the Union. On hearing this, Sherman "raised her hands and said, 'I don't know what Simi is. I have my own group to take care of.'" (Tr. 511.) That was the end of the discussion. Sherman was not called as a witness. In consequence, analysis of the meaning and significance of this conversation depends entirely on Gulotta's brief description.

In contrast to the sparse evidence regarding the March 12 discussion, there was much testimony presented by both sides concerning discussions that took place 2 days later. Wilton, a longtime Sweet Brook employee who had retired shortly before the trial commenced, testified regarding a meeting held at the Baxter day room. The meeting was convened by Supervisors Nancy Liss and Terry Willard.[20] After the employees gathered for the meeting, Liss held a flyer in her hand. This flyer was a four-page document that discussed the presence of an individual named Mike Shuey at Sweet Brook. The flyer described him as a "union buster." (GC Exh. 19, p. 2.) It contained several caricatures of Shuey.[21] The document alleged that Shuey had a history of labor-relations misconduct. The text of the last page was as follows:

Did our nursing home spend resident-care money to get the advice

[20] Liss was the director of social work. Willard was a nurse supervisor. The Employer admits that both are statutory supervisors. See, answer to complaint, par. 8 (GC Exh. 1(k)), and Tr. 1119—1120.

[21] These drawings were in no way obscene or degrading. Instead, they appear to have been drawn in light-hearted fashion. For instance, the primary aspects of Shuey's personality that were depicted in them involved the artist's impression that he was fond of suspenders and candy bars.

> of a law-breaker? He sure doesn't seem like a nice guy . . . **In fact, we've even heard rumors that he's humiliated our own supervisors in meetings.** We don't think that's right.
>
> So what do we say to all of this?
>
> **Mike, it's about time for you to go back to Ohio!** Leave us and our supervisors alone. (We'll all chip in and give you some candy bars for the road if it would help.) [Boldface in the original.]

(GC Exh. 19, p. 4.)

Wilton testified that while Liss displayed the flyer to the employees she said, "this is disgusting." (Tr. 567.) She followed this expression of opinion with a question, asking, "Who did this?" (Tr. 567.) While posing this question, she directed her gaze at Doris Tondreau, a nurse. Tondreau did not respond. Liss then asked another employee, Barbara St. Pierre. She also declined to respond. She then directed the question to Wilton who also remained silent. Finally, she asked yet another employee named Grace who did not reply. Wilton testified that, at this point, Liss again opined that the flyer was "disgusting" and added, "I want to know who did this." (Tr. 568.) She expressed her belief that Shuey was "a very nice gentleman." (Tr. 568.) Rising to the bait, Wilton responded, "[Y]ou mean the union buster?" (Tr. 568.) Liss replied in kind, asserting that "[t]he union's going to take your money and the union isn't going to do anything for you." (Tr. 568.) At which, Wilton countered that, "[W]e're the union." (Tr. 568.) As matters escalated, Liss accused the Union of damaging a car in the parking lot. Wilton reported that, at this juncture, Gulotta "had words" with Liss. (Tr. 569)

Gulotta also testified regarding this event. She confirmed that Liss asked the assembled employees where the flyer came from. When nobody answered, she again asked, "where it came from. If we knew who made it." (Tr. 499.) There was still no reply.[22] Liss asked yet again, adding that she thought the flyer was "rude" and that Shuey was "a nice man." (Tr. 499.) At this point, St. Pierre spoke up, accusing Shuey of being a union buster. This prompted a rejoinder from Willard who also asserted that Shuey was a nice person. Liss again demanded to know the author of the flyer, adding, "Do you guys think this is a nice thing to do?" (Tr. 500.) Gulotta seized the opportunity to bait Liss, telling her that she thought she knew who wrote the flyer. Taking the bait, Liss asked whom she thought was its author. Gulotta responded that, "it was probably a group of employees that were insulted by accusations being made by management." (Tr. 500.)

Liss provided detailed testimony regarding this confrontation and the events that preceded it. She explained that a food service manager brought her the flyer, telling her that it had been placed in the breakroom. After examining the flyer, Liss telephoned Gancarz to seek instructions. As with an earlier occasion when a supervisor sought guidance from Gancarz, there is an evidentiary question about the precise extent of Gancarz' directives. Although the Employer called Gancarz as a witness, she was not asked about this matter.[23] Liss did testify

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[22] As to her own lack of response, Gulotta explained that, "I was afraid to answer." (Tr. 499.)

[23] This failure to solicit Gancarz' recollection of her discussion with Liss is noteworthy. See *Dayton Newspapers,* 339 NLRB 650, 652 (2003) (Board finds violation based, in part, on a party's failure to ask its witness about a disputed conversation in which he had been a participant.)

about what Gancarz told her to do, but that testimony was contradictory and confusing. Initially, Liss reported that after her discussion with Gancarz, she located Willard and explained to her that Gancarz wanted them to "address the flyer." (Tr. 1105.) She explained that Gancarz wanted them "mostly to address" the flyer's allegation that Shuey had humiliated managers in meetings.[24] (Tr. 1106.)

Liss reported that she and Willard then proceeded to hold a series of meetings with employees in the various units. Although elsewhere Liss testified that she was instructed to "mostly" confine her comments to the alleged humiliation of supervisors, when she described the key meeting at Baxter she took great pains to explain that she limited herself strictly to that subject matter. She testified that she told the assembled employees:

> I can't speak to anything else but the last line that says that this gentleman does not—that it says that there are rumors that he humiliates Supervisors in morning meetings. I'm here to tell you that I sit in those morning meetings and this gentleman has not humiliated any of us in those morning meetings. I'm here to address that. So, I'm here to [tell] you that this is not true.

(Tr. 1113.) I find this a very odd formulation. Liss repeats four times in four sentences that she has only convened this employee meeting to convey one piece of information consisting of the fact that Shuey did not humiliate supervisors. As the Bard famously put it, "The lady doth protest too much, methinks."[25] Indeed, under cross-examination, Liss' testimony reinforced my sense that Gancarz' instructions had been broader than a mere discussion of the allegation about supervisors being humiliated. She responded affirmatively when asked if Gancarz "told you that you were supposed to go and tell them the truth about this flyer." (Tr. 1125.) In follow-up, Liss was asked:

> GENERAL COUNSEL: Is it correct that she told you that you're to tell Employees that the truth was that none of the Supervisors were humiliated by Mr. Shuey?
>
> LISS: No, she did—no.

(Tr. 1125.)

In addition to contending that she very carefully confined her remarks at Baxter to the subject of Shuey's behavior at management meetings, Liss also stressed that she did not ask any questions about the flyer or about the Union.[26] She also denied characterizing the flyer as

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[24] I find her use of the term "mostly" to be significant. Indeed, she repeatedly used this term in her testimony about her statements regarding the flyer. For instance, in her meeting with employees of the DH Unit, she told them that, "I was just here to address this flyer that was brought to my attention, mostly the last line, which states that this gentleman that is here humiliates the Supervisors in morning meetings." (Tr. 1110.) Her use of this term appears to be an attempt to avoid a definitive statement that Gancarz only instructed her to address one relatively minor point involving the flyer.

[25] Hamlet (III, ii, 239).

[26] In what I can only view as a proverbial attempt to "gild the lily," Liss recounted that at her next employee meeting at the Davis unit, one of the employees examined the flyer and told Liss, "Oh, I know who did this." (Tr. 1117.) Liss claimed that she replied, "Oh, you do? Oh, oh, I

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disgusting or accusing union supporters of damaging a car.

In resolving the conflict in testimony about the Baxter meeting, I readily conclude that the accurate version was presented by the employee witnesses. Their testimony was detailed and consistent. On the other hand, Liss' testimony was inconsistent, illogical, and implausible. Specifically, I agree with counsel for the Union's assessment of the logic and plausibility of Liss' claim to have rigidly restricted herself to one small topic of discussion. As he describes it,

> When Ms. Liss took the witness stand in this hearing, she testified that Administrator Gancarz instructed her "mostly" to address a single statement on page four of the flier regarding the way Shuey had reportedly treated supervisors at meetings; however this suggestion strains credulity. It would serve no conceivable purpose for Sweet Brook to interrupt the work of its employees to assert that Mr. Shuey had not humiliated any managers when that assertion would have absolutely no impact on employees' decision as to whether having a Union was worthwhile.

(CP Br. at p. 19.) While this puts it a bit strongly, I essentially agree that it is unlikely that a series of employee meetings would be convened solely to discuss a topic of only marginal interest to those employees who were affected by the organizing campaign. Instead, I find that Wilton and Gulotta's contention that the meeting included repeated interrogations regarding the authorship of the flyer is credible and accurate.

These events arising from management's responses to the Union's organizing effort led to the filing of a flurry of charges in the latter part of March. In those charges, the Union alleged that the Company committed unfair labor practices in the conversation regarding Simi Norilla, in the interrogations about the Shuey flyer, in the distribution of copies of the letter to Hasegawa, and in the response by Card to Sticker Day. (R. Exhs. 21, 22, 30, & 32.)

During this unsettled and contentious period, a former employee of Sweet Brook, Nicole Moran, started a home healthcare business named Compassionate Care. In her efforts to staff the new organization, she engaged in recruitment of some of her former colleagues at Sweet Brook. Among the employees who accepted her offers of new positions were Carmain and Miller. More significantly for this case, Moran also offered employment to Martin. Because the new job would include a pay raise, Martin decided to accept.

On March 26, Martin wrote her letter of resignation from Sweet Brook. It was direct and to the point, providing in its entirety, "[t]his is my two week notice. My last day will be April 8th. Thank you." (R. Exh. 8.) She hand-delivered this letter to a supervisory employee, Wendy Kelly. Because another person was present in Kelly's office at the time, Martin did not engage Kelly in conversation. Later that day, Martin returned to Kelly's office and the two spoke about the resignation. Martin provided uncontroverted testimony that Kelly "asked me to stay and if there [w]as anything they could do to keep me." (Tr. 127.) Martin responded in a joking manner by asking for more money. Kelly replied that, "I wish I could do that." (Tr. 127.) The two then agreed that Martin would work on April 7 and 8, days on which she had previously been scheduled for time off.

On April 2, Martin's career plans received an unexpected jolt when she learned that she

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don't want to know." (Tr. 1117.)

was pregnant. This posed a dilemma since, "[w]ith the job at Compassionate Care the benefits weren't as good. I wouldn't accrue benefit time like I would at Sweet Brook . . . . Maternity leave was my big issue." (Tr. 127.) In consequence, Martin decided to remain at Sweet Brook. She telephoned Kelly and "told her what I decided and she said I'm going to talk to Cindy [Dix] and I'll call you back." (Tr. 128.) Martin reported that she understood that Kelly lacked authority to accept Martin's request to retract her resignation and that the decision would have to come from Dix.

When Martin did not receive a follow-up telephone call from Kelly, she contacted her again on the following morning. Kelly reported that she had raised the matter with Dix and that Dix wanted to meet with Martin about it. Although Martin worked over the next 2 days, Dix was not on duty.[27] It was not until April 6 that a meeting could be arranged.

During the intervening period between Martin's request to withdraw her resignation and her meeting with Dix, upper level managers were informed of Martin's request. Moresi indicated that she heard about it on April 6 from either Dix or Kelly. Moresi testified that she believed that it would fall to Dix to make the decision about whether to permit Martin to withdraw her resignation. As she described it, "She was Elise's supervisor or manager. She's the director of nursing, at that time. It was ultimately her decision." (Tr. 919.)

As is increasingly becoming a feature of both modern life and modern litigation, the course of management's deliberations about Martin's future may be closely observed through a string of e-mails that were generated among the participants. At 8:29 a.m. on April 6, Moresi addressed an e-mail to Dix and Gancarz with a copy to Kelly. In it, she advised that Kelly had just asked her what had been decided regarding Martin. Moresi added "My thoughts is that we let her leave, she had done this in the past and we are trying to Change the environment here. Your thoughts"[28] (GC Exh. 28.)

Gancarz testified that this e-mail represented her first knowledge that Martin was seeking to withdraw her resignation. Upon receiving this e-mail, Gancarz reports that she engaged in the following analysis:

> I reflected on conversations with Sharon and Cindy Dix about Elise's history of absenteeism and her history of coming to the facility and leaving and coming back to the facility and leaving. And decided that based on the culture change that we needed with employees in the building that we should not hire her back.

(Tr. 1140.) Gancarz indicated that she did not recall whether she actually spoke to Moresi or Dix about Martin's request at that point. However, Moresi testified that she did not speak with Gancarz or Dix after sending her e-mail about Martin. I readily credit Moresi's testimony on this point as it conforms to the clear evidence provided by the e-mail string. That record of correspondence shows that Gancarz replied to Moresi's e-mail precisely 2 minutes later, at 8:31 a.m.

Gancarz' response to Moresi's inquiry about Martin's request was as brief as the time it took her to engage in her reflections on the issue. She simply informed Moresi and Dix that, "We should not let her come back." (GC Exh. 28.) Eight minutes later, Moresi responded to

[27] Those 2 days were the weekend of April 4—5.

[28] I have not altered the original's grammar, capitalization, and punctuation.

Gancarz and Dix with the comment that, "[t]hose were my thoughts as well." (GC Exh. 29.) Somewhat superfluously, Dix finally joined the e-mail discussion 2 minutes later, observing that, "Elise . . . as I explained to Wendy, I do not want to keep her." (GC Exh. 29.) [Ellipsis in the original.] Thus was the matter of Martin's fate decided. Moresi testified that there were no conversations among the three managers after this chain of brief e-mail messages. Gancarz readily noted that she had been the actual decisionmaker. All that remained was to convey the decision to Martin.

Martin testified that she performed her usual duties during the morning of April 6. At the time of her normal morning break, approximately 9:30 to 9:45 a.m., she went to Kelly's office and asked to speak with Dix. Kelly called Dix and arranged a meeting. The meeting was attended by Dix, Moresi, and Martin. Moresi was present as a witness and did not speak during the brief encounter.

According to Martin, Dix began the meeting by observing that, "I hear a rumor that you want to take your notice back." (Tr. 251.) Martin confirmed this. Dix's response, in its entirety, was that, "[Y]ou hated your job enough to put in your notice, we're not going to take you back." (Tr. 251.) On hearing this, Martin says that she burst into tears and fled the office.

Moresi's version of what transpired at the brief meeting is substantially similar to Martin's account.[29] As she described, Dix began the meeting by reporting that, "I hear you want to take back your resignation." (Tr. 937.) Moresi was unable to recall whether Martin made any response to this introductory comment. Dix went on to tell Martin that, "I don't really think that's a good idea, you have decided to put in your resignation and you're unhappy; sometimes, it's okay to leave the job that you're in and you might find a different position that's better for you, so we're not going to let you take your resignation back." (Tr. 937.) Moresi agreed that, on hearing this news, Martin began to cry and "stormed out of the door." (Tr. 937.)

At this juncture, it is appropriate to make two further comments regarding the Employer's position as to the contents of this crucial exchange between Dix and Martin. First, it must be noted that the Employer failed to call Dix as a witness regarding either the decision to refuse Martin's request or the manner in which that decision was conveyed to Martin. The Employer has utterly failed to offer any reasonable explanation for this. Dix remained employed as a supervisor at Sweet Brook throughout the first week of this trial. She departed in October 2009 in order to resume her education. Prior to resigning, she provided the Employer with a full month's notice. As her departure occurred after the initial week of testimony, the Employer was clearly on notice as to the significance of her role in these matters. The record contains absolutely no indication of any difficulty in securing her cooperation as a witness. Nor does it indicate that she was ever issued a subpoena. As I result, I conclude that it is appropriate to draw an adverse inference from the Employer's failure to elicit testimony from Dix.[30]

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[29] I agree with counsel for the Union's characterization of the two descriptions of this key meeting. As he puts it, "Ms. Moresi's version of this conversation is slightly different (in a watered-down sort of way.)" He also colorfully described it was a "milquetoast version." (CP Br. at p. 24, fn. 7.) I agree with him that, to the extent there are any material differences in the two accounts, it is Martin's account that should be credited. Even months later on the witness stand, I was struck by her sense of genuine shock and dismay at the manner in which the meeting was conducted. Her demeanor and presentation reinforced my conclusion that she was a reliable witness.

[30] In describing the nature of this inference, the Board has quoted a well-known legal encyclopedia stating that, "where relevant evidence which would properly be part of a case is

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The second item of significance in determining what took place between the Employer and Martin on April 6 is the Employer's version presented in its position statement dated May 21, 2009.[31] In that document, counsel for the Employer asserts:

> While the Union now claims that Martin was not permitted to withdraw her resignation, that is not true. At the point that Martin walked out of the April 6th meeting with Dix and Moresi, Sweet Brook had neither approved nor denied Martin's request to withdraw the resignation. Rather, Dix and Moresi were attempting to discuss the request with Martin and understand the basis for the request and gather the facts they needed to make a decision.

(GC Exh. 25, p. 5.) Whatever minor differences in nuance exist between Moresi's account and Martin's testimony, neither version in any way supports this description of the meeting. Furthermore, the e-mails exchanged among the managers conclusively demonstrate that this version is entirely fictional.

Martin testified that after leaving this meeting in tears she returned to the Davis unit and spoke to her charge nurse, Anne Powers.[32] Martin reported that, "I told her what happened and I told her I was leaving and gave her a hug and left." (Tr. 143.) Powers responded by observing that, "I can't believe they're doing this." (Tr. 262.) Martin advised Powers that she had a "couple of people left" that needed services. (Tr. 143.) She conceded that she then departed the facility and failed to swipe out when doing so.

At 9:59 a.m., Dix e-mailed Gancarz to inform her that, "Elise came to me just now to withdraw her resignation. I had Sharon Moresi sit with us. I told Elise that we would not withdraw the resignation, she didn't say a word, got up went to Davis, grabbed her things and walked out of the building." (GC Exh. 30.)

On April 30, the Union filed a charge alleging that the Employer's refusal to permit Martin to withdraw her resignation was unlawful because it was based on a prohibited discriminatory motivation. (R. Exh. 71.) At no time since April 6 has the Employer offered employment to Martin.

B. Legal Analysis

The General Counsel contends that the Employer's actions and statements made during the Union's organizing campaign violated the Act in numerous instances. I will assess each such claim in chronological order.[33]

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within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him." *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn.1 (1977). See also, *Daikichi Sushi,* 335 NLRB 622 (2001), enf. 56 Fed. Appx. 516 (D.C. Cir. 2003).

[31] The Board holds that position statements submitted by respondents are admissible. *Roman, Inc.,* 338 NLRB 234 (2002).

[32] Moresi confirmed that Powers was Martin's charge nurse on that day.

[33] In a few cases, the chronology may not be exact. The Board has recently held that precision as to dates is not mandatory. Thus, where the evidence demonstrates that the

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1. The Employer's policy regarding solicitation

Prior to the Union's campaign, Sweet Brook maintained a policy regarding solicitation on its premises. That policy was contained in its handbook issued to all incoming employees. The policy provided that nonemployees were prohibited from engaging in any solicitation of employees. As to staff members, the policy stated:

> Staff may not solicit other staff members for any purpose, at any time, in any area devoted to resident services. Staff who are on their free time or break time, may not solicit or distribute literature to staff members who are working . . . . Violations of the preceding guidelines will result in appropriate disciplinary action.

(GC Exh. 7, p. 93.)

This policy, which was in effect well before the initiation of the Union's organizing effort, appears to be generally consistent with the Board's legal requirements. The Board has summarized the content of its precedents in this area as follows:

> Under that precedent, a hospital's prohibition of solicitation or distribution of literature in immediate patient care areas even during employees' nonworking time, is presumptively lawful. Restrictions on solicitation, during nonworking time and in nonworking areas, however, are presumptively unlawful even with respect to areas that may be accessible to patients. The Supreme Court has upheld these presumptions as consistent with the Act, and we find no support in the record of this case for departing from these well-settled principles. [Footnotes omitted.]

Brockton Hospital, 333 NLRB 1367, 1368 (2001), enf. in pertinent part 294 F.3d 100 (D.C. Cir. 2002), cert. denied 537 U.S. 1105 (2003).

In my view, a fair reading of the Employer's policy indicates that it permits solicitation among employees during nonworking time and in areas that are not devoted to resident care. Unfortunately, once the Union began its activities directed at organizing the employees, management abruptly altered its preexisting rule. Martin and Gulotta provided uncontroverted and credible testimony that, shortly after employees began distributing prounion literature, signs were posted on the doors of the building that prohibited all solicitations. Carmain pinpointed the timing of this as coming "[w]ithin days after our first Union flyer was distributed." (Tr. 687.) Even more clearly, Gulotta's husband, an employee in the maintenance department, testified

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unlawful conduct did occur, "minor discrepancies" as to the chronology are not problematic. The key determination is whether the General Counsel has presented a "satisfactory foundation" such that "there is no indication that the date uncertainty caused any party" to experience prejudice. *Empire State Weeklies,* 354 NLRB No. 91, slip op. at 2 (2009). I have carefully considered this question regarding those events whose precise dates are not fully delineated. It is clear that all parties understood the allegations of misconduct and the Employer was not hampered in its ability to defend against the allegations due to any imprecision.

that he witnessed his supervisor ordering another member of that department to post the signs. This took place after the union campaign began. He observed this fellow employee as he implemented the directive by sticking one of the signs on the fire door of the DH unit.

The Employer does not dispute the timing or content of the newly posted signs that were placed at the entry points of the facility. Indeed, the Employer provided a photocopy of one of those signs. It clearly states, "NO SOLICITING." (GC Exh. 20.) It is obvious that these new signs represent a significant tightening of the Employer's preexisting solicitation policy. The signs mandate a complete prohibition of solicitation, including solicitation among employees who are not on working time or in a resident care portion of the facility. Furthermore, there was no contention by the Employer that it issued any statement or clarification of the newly posted blanket prohibition.[34] A reasonable employee would be compelled to conclude that solicitation within the building was now prohibited under all circumstances.

It is clear that the new prohibition on solicitation contravenes the Board's guidelines for such work rules and violates the Section 7 rights of the employees by prohibiting solicitations that did not involve worktime or resident care areas of the facility. As such, it represents an overbroad work rule whose implementation violates Section 8(a)(1) of the Act. *Beth Israel Hospital v. NLRB,* 437 U.S. 483 (1978).

Beyond this, the decision to post the new rule immediately after the Union's campaign began also represents conduct that unlawfully restrains, coerces, and interferes with the rights of the employees in violation of that subsection of the Act. As the Board has explained:

> While the Act does not prevent an employer from making and enforcing reasonable rules addressing employee conduct during worktime, it is a violation of the Act for an employer to make changes to established practices . . . when its motivation for doing so is the protected activity of its employees . . . . The Respondent's failure to offer any persuasive explanation for the imposition of new restrictions on employee conduct previously allowed supports our finding that the restriction was in retaliation for the organizational effort. [Citations omitted.]

Cast-Matic Corp., 350 NLRB 1349, at fn. 4 (2007). In this case, the Employer never attempted to offer any explanation that would justify its implementation of a new and total prohibition of solicitation imposed at the precise time that the Union decided to engage in its organizing campaign. The Employer's conduct was clearly unlawful.

2. The Employer's distribution policy

The General Counsel contends that, on February 17, Director of Nursing Dix promulgated an overly broad distribution policy. It will be recalled that the Employer's handbook contains a solicitation policy that had been in effect prior to the Union's campaign. That policy

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[34] As the Board has explained, "[t]o be effective, narrowing interpretations of overly broad rules must be communicated to the entire work force covered by the rule." *Guardsmark, LLC,* 344 NLRB 809, 811 (2005). While Moresi and Gancarz reported that solicitation remained permissible "in the staff dining room and in break areas," this was never communicated to the employees. (Tr. 829.) The Employer took no action whatsoever to suggest that there were any permissible exceptions to the total prohibition on solicitation announced by the new signs.

also governed distribution of literature by employees while on the premises. The policy prohibited such distribution during working time and in "resident service areas." (GC Exh. 7, p. 93.) It also prohibited employees who are not on working time from distributing items to employees who are on working time.

On the date in question, Martin testified that she was present at the Baxter nurses' station. She observed a coworker bring union flyers into the nurses' station and post one of them on a vertical surface that would make it visible to employees in the station. Unit Manager Sherman saw the posted flyer and left the area. Shortly thereafter, Sherman returned in the company of Dix. Dix confiscated the flyer and ordered Martin to report to her office. Once there, Dix told Martin that hanging flyers in the nurses' station was "unacceptable." (Tr. 111.) Dix added that it was only permitted to distribute flyers in the employees' breakroom. She warned that, "[I]f I see anyone doing it again they will be reprimanded." (Tr. 111.) I have previously explained my conclusion that Martin's testimony regarding this event is both reliable and substantially corroborated by testimony from Gancarz and Kelly Miller.

The General Counsel advances two rationales for concluding that Dix violated Section 8(a)(1) when she met with Martin regarding the distribution of union literature. In the first place, counsel for the General Counsel correctly observes that the rule articulated by Dix is significantly different from the preexisting rule set forth in the handbook. While the handbook permits distribution of literature during employees' nonworking time in any area of the facility that is not a so-called resident service area, Dix's directive limited such distribution solely to the employees' breakroom. As the General Counsel notes, this newly promulgated construction of the distribution policy would eliminate the preexisting authorization to engage in distribution in such areas as the employees' dining room, the employees' parking lot area, and various mixed-use portions of the facility such as the kitchenettes.[35]

It is obvious that Dix's newly established policy was issued in direct and immediate response to the initiation of the organizing campaign and her discovery of the presence of union literature in the nurses' station. The Board holds that, absent proof of a genuine need to prevent work disruption, implementation of an otherwise facially valid work rule will violate Section 8(a)(1) if "the Respondent instituted it specifically in response to its employees' union organizing activities." *City Market, Inc.,* 340 NLRB 1260 (2003). Here, the nexus between the announcement of this newly restrictive distribution rule and the union's organizing effort is obvious. The Employer did not attempt to offer any justification for the new policy grounded in concern about the disruption of work or the impact on patient care. Indeed, it would be difficult to visualize any impact on the work process given that the effect of the new rule on the preexisting policy was simply to preclude distribution during nonworking times in places outside of resident services areas. As a result, I find that Dix's announcement of new restrictions on employees' distribution of literature was made in violation of Section 8(a)(1) of the Act.

I also agree with the General Counsel's secondary argument regarding this rule. It is not entirely clear whether the nurses' station represents a resident care area of the facility as defined in the handbook's distribution rule. Even if it is assumed that such is the case, the fact remains that the Employer has tolerated solicitation and distribution by employees at the station in the past. Various witnesses testified that the nurses' stations were the scene of solicitations and distributions of literature for Avon products, Tupperware, fund raising campaigns,

[35] That Dix's new policy represented a change from the existing work rule was underscored by Gancarz' testimony that, "any literature would be allowed in the Staff Dining Room but not out on the Nurse's Unit." (Tr. 1168.) Under Dix's rule, this would no longer be true.

Pampered Chef items, and bake sales. Martin reported that members of management participated in these activities and never attempted to discourage them. Gulotta confirmed this, citing three specific instances when she made sales to supervisors. Wilton testified to the same effect, noting that such activities in the nurses' stations were, "perfectly all right" as far as management was concerned. (Tr. 565.) Indeed, Wilton reported that Avon catalogs remained at the nurses' station after the union campaign was underway. This testimony was also consistent with the fact that management witnesses never contended that they had enforced the no-distribution policy regarding the placement of such materials in the nurses' stations.

The Board prohibits disparate enforcement of work rules. For example, in *Verizon Wireless,* 349 NLRB 640 (2007), the employer maintained a written policy against solicitation during working time. Pursuant to this work rule, it imposed discipline on an employee named Neubauer for attempting to obtain signatures on union authorization cards during work time. The Board noted that, despite the existence of the written policy, "employees were seen during working time going from cubicle to cubicle selling items (such as candy, meals, and Girl Scout cookies) to their coworkers." Id. at 641. In finding the discipline of Neubauer to be unlawful, the Board discussed the principle involved:

> [T]he Respondent maintained a rule prohibiting solicitation for any purpose on working time. Such rules are presumptively lawful . . . . However, the presumption of lawfulness is effectively rebutted here, as the record reflects that the Respondent permitted a variety of nonunion solicitations during working time and sought to enforce its rule only against Neubauer's union solicitation . . . . In these circumstances, the Respondent's . . . . disparately applied rule violated Section 8(a)(3). [Citations omitted.]

349 NLRB at 642.[36]

While the placement of union literature in the nurses' station may have constituted a violation of the handbook's distribution policy, the Employer nevertheless engaged in an unfair labor practice where it threatened discipline "pursuant to an otherwise valid no-solicitation rule, when it intentionally target[ed] union solicitors while tolerating nonunion solicitations by other employees." *SNE Enterprises, Inc.,* 347 NLRB 472, 473 (2006), enf. 257 Fed. Appx. 642 (4th Cir. 2007).

Under both legal theories advanced by the General Counsel, I conclude that the Employer violated the provisions of the Act by announcing a newly restrictive rule on distribution and by disparately threatening enforcement of its distribution policies against union activity while accepting violations of the policy by employees engaged in distribution of nonunion-related materials.

3. The Employer's response to Sticker Day

One of the major events conducted by the Union during its campaign was a demonstration of its support among Sweet Brook employees that it called Sticker Day. On

[36] Because the employer in *Verizon* actually imposed discipline, the Board referred to the violation as involving Sec. 8(a)(3). However, in the citation in support of its conclusion, it added that the same course of conduct would also violate Sec. 8(a)(1).

February 21, Hasegawa stationed himself outside the workplace and distributed stickers to employees who wished to show their support for the Union. The stickers bore the Union's logo and the slogan, "Be fair to those who care." Numerous employees chose to place the stickers on their clothing. This was observed by the weekend nurse manager, Linda Card. By her own account, Card e-mailed Gancarz to ascertain the appropriate response by management. For reasons already discussed, I have determined that Gancarz instructed Card to prepare a list of employees who had chosen to wear the stickers. There is no doubt that Card complied with this instruction. Indeed, the evidence of record contains two such lists compiled by Card. The first list is a handwritten document while the second is an e-mail that transmitted the names to Gancarz.

The General Counsel alleges that one particular aspect of Card's behavior on Sticker Day constituted an unfair labor practice because it consisted of unlawful surveillance of protected activity and also the creation of an impression of such unlawful surveillance. At the outset of my analysis, I note that the Board has authorized a finding of both such forms of unlawful conduct where the course of events contravenes the Board's prohibition against both surveillance and creation of an impression of surveillance as has been alleged here. In *Ivy Steel & Wire,* 346 NLRB 404 (2006), the administrative law judge found that the employer violated the Act by "engag[ing] in, and/or creat[ing] the impression that it was engaging in surveillance." Id. at 404. The Board adopted this approach, noting that such a dual finding had an impact on the appropriate remedy since the dual finding would require an order that the employer "cease and desist from engaging in both kinds of unlawful conduct." Id. at 404. In my view, Card's response to Sticker Day involved both sorts of misconduct and requires a remedial approach consistent with that conclusion.

The starting point for evaluation of Card's behavior must be the clear recognition that there was nothing unlawful about her natural human inclination to take note of which employees chose to wear the stickers. Indeed, it is entirely possible that one of the reasons the employees chose to engage in this behavior was to send a message to management regarding their support for the Union. As the Board has explained:

> We have no quarrel with the judge's observation that those who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them. The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not "do something out of the ordinary." [Footnotes omitted.]

Eddyleon Chocolate Co., 301 NLRB 887, 888 (1991). However, as indicated by the language of the final sentence of this quotation, the Board does prohibit an employer from conveying a message to its employees that "it is closely monitoring the degree of an employee's union involvement." *Flexsteel Industries,* 311 NLRB 257, 258 (1993).

I have carefully examined Card's behavior on Sticker Day and conclude that it was designed to send a coercive message to those employees who elected to manifest their union support by wearing the stickers. There was consistent and credible testimony from the affected employees that Card's behavior was notably peculiar. She took pains to ostentatiously examine the sticker wearers and follow this scrutiny with an immediate written notation on a clipboard. As Melinda Gulotta phrased it, Card's behavior was "very unusual." (Tr. 502.) The testimony of the employees was strongly corroborated by the evidence of management's reaction to Sticker Day, including Gancarz' directive to Card to prepare this list of employees and to confront the

employees regarding their judgment in choosing to display the stickers.

In sum, I find that Card engaged in a deliberate effort to convey a coercive and intimidating message by making a great show of noting and recording the names of those employees who wore stickers.[37] Because her conduct was designed to interfere with the protected activities of the employees, it violated Section 8(a)(1). In addition, because it bore aspects of both an actual surveillance conducted in an unlawful manner and the deliberate creation of an impression of surveillance, I will recommend that the Employer be ordered to cease both forms of intimidation.

4. Moresi's presence in the parking lot

The General Counsel next alleges that Moresi engaged in unlawful surveillance of employees by maintaining a vigil in the facility's parking lot during a period from "about mid-February and early March." (GC Exh. 1(e), p. 3.) This allegation is premised on testimony from two employees and Moresi's participation in a confrontation with Hasegawa.

The first such testimony consisted of very brief statements by Wilton. She reported that after the organizing campaign began she observed Moresi sitting in her car in the parking lot. When asked for details as to Moresi's behavior, Wilton simply reiterated that Moresi was, "[j]ust sitting." (Tr. 571.) Under cross-examination, Wilton reported that she made this observation on two occasions.

The second witness to report Moresi's presence in the parking lot was a custodial employee, Gary Charron. Charron reported that after the Union's campaign began he observed Moresi, Kelly, and Sherry Sprague standing outside their vehicles in the parking lot. I asked what he saw them doing and learned that the three were "[j]ust standing there, talking." (Tr. 453.) On cross, Charron was asked how often he had witnessed this behavior and reported that he had observed it "[a] couple of times, three times. That's about it." (Tr. 480.)

Finally, there is no dispute that Moresi was involved in an incident with Hasegawa that took place in the parking lot. Hasegawa testified that he was present in his automobile at approximately 6:30 to 7 a.m. He was there to deliver union leaflets to Melinda Gulotta. He testified that once he spotted Gulotta he looked inside his vehicle in order to pick up the leaflets. He described what happened next as follows: "I looked up and Sharon Moresi was in my window." (Tr. 392.) As indicated earlier in this decision, Moresi then blocked Hasegawa's attempt to pass the leaflets to Gulotta and ordered him to depart from the property.

Moresi testified that during the period under examination she came to work "between 6:00 and 6:30 every day." (Tr. 816.) The Employer's time and attendance records corroborate this testimony.[38] (R. Exh. 34, pp. 29 & 30.) Like all the employees, she parked her car in the

[37] In my view, the message Card was sending on behalf of the Employer was the one epitomized by the old military expression of "kicking a- - and taking names."

[38] The best indication of the date of the Hasegawa-Moresi parking lot confrontation is Gancarz' subsequent letter to Hasegawa. In that letter, she asserted that Hasegawa was in the parking lot on February 28 and March 2. (GC Exh. 9.) Moresi's time records for those dates show that she clocked into work at 6:40 a.m. on each day. Given that Hasegawa testified that the confrontation occurred between 6:30 and 7 a.m., it is certainly reasonable to conclude that the event happened as Moresi was reporting to work. As a result, her appearance at Hasegawa's car window is at least as likely to represent a coincidence rather than some

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employee portion of the facility's parking area located in the rear portion of the lot. She then walked through the visitors' parking area in order to enter the building. She flatly denied engaging in any intentional plan of surveillance of employees' activities in the lot.

As I have already noted, the Board's jurisprudence in this area recognizes that open union activity may well be observed by supervisors. The Board's analysis focuses on whether these observations were ordinary or represented unusual behavior. In *Aladdin Gaming, LLC,* 345 NLRB 585 (2005), rev. denied 515 F.3d 942 (9th Cir. 2008), the Board explained:

> A supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. However, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is "out of the ordinary" and thereby coercive.
> . . . .
>
> In *Wal-Mart Stores,* 340 NLRB 1216, 1223 (2003), for example, the Board found that a manager's 30-minute observation while sitting on a bench outside the store of union handbilling taking place in the employer's public parking lot, unaccompanied by other coercive behavior, did not constitute unlawful surveillance. Similarly, in *Metal Industries,* 251 NLRB 1523, 1523 (1980), the Board found that an employer did not unlawfully surveil its employees where the employer had a longstanding practice of going to the employee parking lot to say goodbye to its departing employees at the end of the workday. The employer's observance of the employees' Section 7 activity was inseparable from its regular and noncoercive practice.

345 NLRB at 586. [Some citations omitted.]

Applying this test, there is simply insufficient evidence to conclude that Moresi engaged in unlawful surveillance in the facility's parking lot. There was nothing unusual in her presence on the lot as it was her pattern to drive to work in the early morning and park her vehicle in that location. There was no testimony indicating that she was engaged in behavior suggestive of coercive observation of protected activity. Standing in the lot and engaging in conversation with colleagues is not out of the ordinary. Isolated instances of sitting inside her vehicle before entering the building are likewise not probative of unlawful conduct. While the encounter with Hasegawa is more suggestive, there is no evidence that it was the product of surveillance as opposed to happenstance. The incident occurred in a location and at a time when Moresi was commonly present in that area.[39]

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evidence of surveillance.

[39] This contrasts with the Board's finding of a violation in *Sprain Brook Manor Nursing Home, LLC,* 351 NLRB 1190 (2007), where a supervisor stationed herself to observe union activity in the nursing home's parking lot. In that case, the evidence demonstrated that the surveillance occurred on a weekend, a time when the supervisor was not ordinarily present at the facility. Indeed, the supervisor testified that the reason she was there on the day in question was solely for the purpose of watching the union activity. All of this stands in sharp contrast to Moresi's routine presence in the parking lot.

The Board has cautioned that "mere suspicion cannot substitute for proof of an unfair labor practice." *Lasell Junior College,* 230 NLRB 1076 (1977). Based on the totality of circumstances, I conclude that the General Counsel has failed to meet his burden of proving that Moresi's behavior in the parking lot represented any violation of the Act. I will recommend dismissal of this allegation of unlawful surveillance.

5. Moresi's questioning of Martin regarding an unfair labor practice charge

The General Counsel alleges that Moresi engaged in another episode of unlawful conduct consisting of an improper interrogation and the making of an implied threat of reprisal for protected activities. Unlike the surveillance allegation, I conclude that the evidence clearly established that Moresi did engage in this unlawful behavior.

The episode in question occurred on March 2. That afternoon, Moresi approached Martin and asked to speak with her. They stepped into a hallway where Moresi showed Martin a copy of an unfair labor practice charge filed by the Union. The charge concerned Dix's admonition of Martin for her supposed distribution of union flyers. Martin was specifically named in the charging document. I credit Martin's report of the ensuring conversation which began with Moresi "ask[ing] me if I had ever seen it." (Tr. 116.) When Martin replied that she had not seen it, Moresi retorted that, "[W]ell, your name is on it." (Tr. 116—117.) On hearing this, Martin began to cry. Moresi then advised her, "[D]on't worry, Cindy [Dix]'s not mad at you . . . . We know it's the union that's doing this, not you." (Tr. 118.) Later that day, Moresi again addressed Martin on this topic, asking if she was "okay." (Tr. 234.)

Counsel for the General Counsel contends that Moresi's statements constitute two separate violations of Section 8(a)(1), an unlawful interrogation and an unlawful threat. I agree. As to interrogation, the standard for analysis is as follows:

> Under Board law, it is [well-established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter. [Footnote omitted.]

Norton Audubon Hospital, 338 NLRB 320, 320—321 (2002).

In this situation, the context, including the hotly contested organizing campaign, heightens the coercive nature of the exchange. The identity of the questioner is also a factor that supports a finding of illegality as Moresi was outside Martin's normal chain of command and was customarily involved in matters of employee discipline. The place of interrogation, a hallway, was not indicative of coercion, but the method of interrogation was since it involved Martin's removal from her work location for a private discussion with a high management official. Since Martin was an open union supporter, this factor does not support a finding of misconduct. Finally, and most significantly, I conclude that the nature of the information being sought was a powerful factor demonstrating a clear intent to restrain, coerce, and interfere with Martin's right to engage in union activity.

Moresi's primary question of Martin, whether Martin had seen the unfair labor practice charge filed by the Union, was clearly designed to ascertain the extent of Martin's involvement in protected union activities. The Board has strongly expressed its particular concern regarding interrogations that represent "a pointed attempt to ascertain the extent of the employees' union activities." *SAIA Motor Freight, Inc.,* 334 NLRB 979, 980 (2001). Furthermore, the Board has stated its condemnation of the interrogation of employees "because they have filed an unfair labor practice charge or because someone has filed such a charge on their behalf." *Quality Engineered Products,* 267 NLRB 593, fn. 3 (1983).[40] This is precisely what Moresi did. Based on the totality of the circumstances, I conclude that her questions to Martin regarding the unfair labor practice charge constituted an unlawful interrogation and violated Section 8(a)(1).

The General Counsel also argues that Moresi's statements to Martin represented an implied threat against her due to her participation in protected activities. Counsel for the General Counsel explained her reasoning as follows:

> [B]y linking her assurance that "Cindy is not mad at you" to her belief that the Union, and not Martin, was responsible for the charge, she gave the clear impression that *if Martin had been responsible, then Dix would be "mad" at her*—a fact that would easily be perceived as a basis for discipline. [Italics in the original.]

(GC Br. at p. 37.)

I agree with this analysis. Moresi's remarks were a sly attempt to insinuate that Martin's involvement in the Union's filing of unfair labor practice charges would anger management. This point was underscored by the fact that it followed on the heels of Moresi's interrogation of Martin regarding her knowledge about the filing of the charge.

The Board's jurisprudence recognizes that alleged threats by employers must be examined in a worldly, realistic, and thorough manner. As the Board has put it,

> [W]ords must be analyzed in terms of the context in which they appear, for . . . "[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart."

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[40] The General Counsel does not allege that Moresi's interrogation of Martin regarding her participation in the filing of an unfair labor practice charge also violated Sec. 8(a)(4). That subsection prohibits discrimination against employees based on their filing of charges or participation in proceedings before the Board. In my view, Moresi's behavior clearly implicates the concerns underlying that provision of the statute. Nevertheless, I recognize that the Board, in *Quality Engineered Products,* supra at fn. 3, while facing the same situation, opined that it was "unnecessary" to address the matter in light of the finding of a violation of Sec. 8(a)(1). As a result, I will not go beyond the confines of the General Counsel's legal theory.

[Quotation marks supplied.]

L.W.D., Inc., 335 NLRB 241, 242, fn. 6 (2001), enf. in part 76 Fed. Appx. 73 (6th Cir. 2003), citing language from Judge Learned Hand in *NLRB v. Federbrush Co.,* 121 F. 2d 954, 957 (2d Cir. 1941).

I conclude that Moresi's statements, taken in their proper context, represented an unlawful threat of unspecified reprisal against Martin. As the Board has explained, "the test for whether a statement violates Section 8(a)(1) is not whether the statement is unambiguous; it is whether, from the standpoint of the employees, it has a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of protected rights." *Joseph Chevrolet, Inc.,* 343 NLRB 7, 9 (2004), enf. 162 Fed. Appx. 541 (6th Cir. 2006). [Citations omitted.] This conversation had precisely such a reasonable tendency to restrain Martin from the future exercise of her right to participate in union activities.

6. Management's response to Hasegawa's presence in the parking lot

It is undisputed that the Union's organizer, Hasegawa, drove his vehicle onto the Employer's parking lot for the purpose of conducting organizing activities in that location. This led to his confrontation with Moresi. Shortly thereafter, the situation prompted Gancarz to draft a letter to Hasegawa regarding his entry onto the Sweet Brook property. That letter, dated March 6, warned him that his behavior was "nothing more than common trespass" and instructed him to refrain from similar conduct. (GC Exh. 9.)

At the outset, it is important to note that the General Counsel does not contend that Gancarz' letter constituted an unfair labor practice against Hasegawa. (See tr. 426—428.) Nevertheless, the General Counsel does assert that the subsequent distribution of that letter among the employees did represent unlawful activity consisting of the creation of an impression of surveillance and the intimidation of employees regarding their association with Hasegawa. Once again, applying a totality of circumstances analysis, I agree.

While Gancarz testified that she did not direct that her letter to Hasegawa be distributed to employees, she did report that she personally distributed it to managers and supervisors at a meeting held shortly after the letter was written. Employee Carmain testified that a copy appeared on her desk. More significantly, Jeffrey Gulotta provided direct and uncontroverted testimony regarding the distribution of the letter by management. He reported that multiple copies of the letter were posted on the maintenance department's bulletin board. The copy posted in his own section of the message board included his own name which was handwritten in the corner of the document. He testified that he recognized the handwriting as belonging to his supervisor, Gengris. I credit his account and conclude that, whether or not Gancarz ordered it, managers did distribute copies of her letter to Hasegawa among rank-and-file employees.

The General Counsel contends that such distribution created an unlawful impression among those employees that their union activities in the parking lot were being observed by management. The Board's rationale for the impression of surveillance violation is that employees should be shielded from fear that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Fred'k Wallace & Son, Inc.,* 331 NLRB 914 (2000). The analytical test has been described as follows:

> In order to establish an impression of surveillance violation, the General Counsel bears the burden of proving that the employees would reasonably assume from the statement in

> question that their union activities had been placed under surveillance.

Heartshare Human Services of New York, 339 NLRB 842, 844 (2003).

I conclude that Gengris' posting of copies of Hasegawa's letter annotated by the addition of each employee's name on that letter conveyed a subtle but unmistakable impression that their employer was engaged in careful surveillance of union organizing activity in the parking lot. Gancarz' letter to Hasegawa took pains to describe the precise dates and times of his visits to the lot. The letter went on to assert in the strongest terms that management objected to his presence and that his presence was viewed as unlawful. By forcefully drawing the contents of the letter to the attention of individual employees, an unlawful impression of surveillance was conveyed to them.[41] I conclude that a reasonable employee would have been restrained and coerced from engaging in protected activities in the parking lot based on the implicit message conveyed by the distribution of the letter to the Employer's staff.

By the same token, I conclude that the posting of the letter to Hasegawa served to coerce and intimidate employees by indicating that their association with him in the parking lot would be offensive to management. This message was underscored by Gancarz' assertion to Hasegawa that his presence in the parking lot constituted criminal activity.[42] Clearly, no reasonable employee would wish to become involved in conduct that the employer had deemed to be illegal in a published communication posted on the bulletin board. As the Board has observed, "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group,* 339 NLRB 303 (2003). Such is the case here.

7. Sherman's statements regarding Nurse Norilla

As his next allegation, the General Counsel contends that Unit Manager Sherman committed two unfair labor practices during a brief conversation with Melinda Gulotta on March 12. At the time, Gulotta was feeding residents in the Baxter day room. Gulotta's testimony indicated that Sherman entered the room in order to respond to Gulotta's request for certain scheduling information.

In the course of providing Gulotta with the schedule that she had sought, Sherman

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[41] Counsel for the Employer attempts to argue that the letter was distributed to maintenance department employees because those employees are supposed to keep watch against unauthorized visitors to the facility. (See, R. Br. at fn. 36.) There was absolutely no evidence to support this claim. The portion of the handbook cited by counsel (GC Exh. 7, p. 62) makes no mention of such a responsibility for maintenance employees and Gulotta denied that such a job duty existed. (See Tr. 672—674.)

[42] It is far from clear that this was true. For example, on the day that Hasegawa was confronted by Moresi, he was present in the parking lot to meet with Melinda Gulotta. The Employer's handbook instructs that, "Staff members should inform others who may be waiting for them that non-staff may not loiter inside the building nor in areas in front of the building. They should park in the parking lot while waiting for staff members." (GC Exh. 7, p. 96.) The fact that employees were authorized to permit visitors to meet with them in the parking lot distinguishes this case from *North Hills Office Services,* 345 NLRB 1262 (2005) (employer may instruct employee not to speak to union organizer in parking lot where it maintains a rule against all nonemployee visitors and premises were considered to be a possible target for terrorists).

apologized for the delay in furnishing this information, explaining that she was "having a hard time" completing the schedules because she had "been very busy." (Tr. 510.) Obviously feeling defensive about her performance, she continued to justify the delay by noting that "she was having to take care of two units, so she had a lot on her plate." (Tr. 510—511.) Her dual responsibilities arose due to a vacancy for a supervisory position on the Davis unit.

In the course of justifying her tardiness and complaining about her workload, Sherman added that management was thinking of promoting a nurse, Simi Norilla, to fill the vacant position. Gulotta reported that Sherman observed that she thought they would not hire Norilla because "they felt that would take a vote away from you guys." (Tr. 511.) Gulotta opined that this view was "crazy" since Norilla was actually opposed to the Union.[43] At that point, Sherman threw up her hands and said, "I don't know what Simi is. I have my own group to take care of." (Tr. 511.) That was the end of their exchange.

The General Counsel argues that Sherman's brief comments violated Section 8(a)(1) in two ways. First, it is alleged that the remarks created an impression of surveillance presumably by suggesting that the Employer was aware of the employees' opinions regarding the representation issue.[44] Second, it is asserted that Sherman's remarks constituted an unlawful threat because they suggested that the Employer was "making a decision whether or not an employee should be promoted based on that employee's union activities." (GC Br., at p. 38.)

I am at a complete loss to understand how Sherman's comments could be construed as creating an unlawful impression of employer surveillance of union activity. It was apparent that the actual impression that Gulotta drew from Sherman's remarks was precisely the opposite. She boldly informed her supervisor that she was "crazy" to think that Norilla was a union supporter. (Tr. 511.) If anything, Sherman's statement appears to have revealed to Gulotta that management had no idea regarding the views of at least this particular employee. Furthermore, to the extent that Sherman's statement appeared to suggest what she had heard about Norilla's opinions, they did not reasonably give rise to an impression of surveillance. As the Board has noted,

> [a] statement as to what someone has heard could be based on (1) what he had heard from the grapevine *or* (2) what he had picked up from spying. There is no reason to infer the latter as the source over the former. [Italics in the original.]

SKD Jonesville Division L.P., 340 NLRB 101, 102 (2003). Sherman's comment did nothing to indicate the source of her opinion regarding Norilla's sympathies.

The contention that Sherman's comments were coercive because they linked Norilla's

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[43] Gulotta's response was fairly incoherent. She told Sherman that Norilla "was a no vote. They want Simi to vote no." (Tr. 511.) She went on to add, "Why would they want her to vote?" (Tr. 511.) Of course, if Norilla was opposed to the Union it seems obvious why management would seek to have her participate in the representation election. All of this illustrates why I have struggled to comprehend the General Counsel's position regarding Sherman's brief conversation with Gulotta.

[44] I say "presumably" because neither counsel for the General Counsel nor counsel for the Charging Party addressed this aspect of the allegations against Sherman in their briefs. Instead, their arguments focused on the question of whether Sherman's statements were an implied threat.

possible promotion to her attitude toward the Union presents a closer question. On careful reflection, I conclude that the General Counsel did not meet his burden of proving that the statements violated the Act in that manner. The evidentiary record regarding the conversation is truly scarce. It consists of roughly one page of transcript from a single witness. I have already indicated that the testimony was difficult to understand as it contained internal contradictions.[45]

Fundamentally, I find that Sherman was not engaged in an exercise of intimidation or coercion. Rather, her comments reveal that she was focused on justifying her tardiness in responding to an employee's legitimate need for scheduling information and on complaining about her workload. The brief discussion strikes me as simply a bit of typical workplace gossip and griping. To infuse it with a more sinister meaning would be to engage in an impermissible degree of conjecture and speculation. See *Neptco, Inc.,* 346 NLRB 18 (2005).

For these reasons, I conclude that Sherman's statements to Gulotta regarding Nurse Norilla have not been shown to constitute violations of the Act. As a result, I will recommend that the two unfair labor practice allegations arising from those statements be dismissed.

8. Management's response to the Shuey flyer

On March 14, management received a copy of a piece of union campaign literature that provoked a strong response. The item in question was a flyer that discussed the activities of a consultant hired by the Employer, including several drawings of this individual that were somewhat unflattering caricatures. The contents of the flyer were reported to the highest levels of management, specifically Administrator Gancarz. She instructed Liss and Willard, two supervisors, to convene a series of employee meetings to address the flyer. Several such meetings were held, including one attended by Wilton and Melinda Gulotta.

The General Counsel contends that during this meeting Liss conducted an unlawful interrogation of employees regarding their protected activities. Strong evidence establishes the accuracy of this contention. Wilton provided credible testimony that Liss displayed the flyer and commented that she considered it to be "disgusting." (Tr. 567.) Immediately following this comment, she directed her gaze at a nurse, Tondreau, and asked, "Who did this?" (Tr. 567.) When she failed to elicit a response, she posed the same question to another employee, St. Pierre. Not receiving satisfaction, she then queried Wilton. Having again been met with silence, she asked yet another employee who did not respond. Obviously angry and frustrated, Liss again opined that the flyer was "disgusting" and added that, "I want to know who did this." (Tr. 568.) All of this was corroborated by Gulotta's account of this tense confrontation. While Liss denied that she posed any questions about the flyer, I have already explained that her account was inconsistent, illogical, and implausible.

I have previously outlined the factors that the Board considers in evaluating an alleged unlawful interrogation. Among the most salient of those factors is, "whether the questioner appeared to be seeking information upon which to take action against individual employees."

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[45] I was so troubled by the incoherent nature of the evidence on these allegations that I abandoned traditional notions of judicial reticence by telling the lawyers that "I frankly couldn't make heads or tails" about the meaning of Gulotta's description of this conversation. (Tr. 1160.) Despite this broad hint, no further evidence was adduced. To be fair, this may well be due to the impossibility of producing more evidence regarding a brief snippet of workplace conversation.

John W. Hancock, Jr., Inc., 337 NLRB 1223, 1224 (2002), citing *Bourne v. NLRB,* 332 F. 2d 47, 48 (2d Cir. 1964). Any reasonable employee participant in this meeting would have concluded that this was the clear purpose of Liss' repeated inquiry as to the authorship of the "disgusting" pamphlet. The situation is indistinguishable from that described by the Board in *United Services Auto Assn.,* 340 NLRB 784, 786 (2003), enf. 387 F.3d 908 (D.C. Cir. 2004):

> The employees would reasonably perceive that the Respondent had only one objective in questioning [the employees]—to identify who had been engaged in the flier distribution. We find such questioning would reasonably tend to interfere with or deter the exercise of employees' Section 7 rights. [Footnote and citation omitted.]

See also *Parts Depot, Inc.,* 332 NLRB 670, 674—675 (2000), enf. 24 Fed. Appx. 1 (D.C. Cir. 2001) (unlawful to interrogate even an open union supporter about what his face was doing on a prounion flyer).

I find that Liss' persistent questioning of employees regarding their involvement in the protected activity of creating prounion literature constituted a clear interference with the Section 7 rights of those employees. As a result, it was conduct that violated Section 8(a)(1) of the Act.

9. The Employer's refusal to permit Martin to withdraw her resignation

The General Counsel's ultimate allegation, both chronologically and in terms of its impact on the employee involved, is the contention that the Employer engaged in unlawful discrimination against Martin due to her participation in union activities and in order to discourage other employees from doing the same. The Employer counters this contention by asserting that it declined to permit Martin to withdraw her resignation for legitimate reasons unrelated to her prounion activities and attitudes.

In resolving this dispute, I must apply the analytical framework devised by the Board in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399—403 (1983). A comprehensive exposition of that test was provided by the Board in *American Gardens Management Co.,* 338 NLRB 644, 645 (2002):

> *Wright Line* is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. In *Wright Line*, the Board set forth the causation test it would henceforth employ in all cases alleging violations of Section 8(a)(3). The Board stated that it would, first, require the General Counsel to make an initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The ultimate burden remains, however, with the General Counsel.
>
> To establish his initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was

> aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action.
>
> If, after considering all of the relevant evidence, the General Counsel has sustained his burden of proving each of these four elements by a preponderance of the evidence, such proof warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse employment action and creates a rebuttable presumption that a violation of the Act has occurred. Under *Wright Line* the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [Internal quotation marks, citations, footnotes, and language not relevant to this case have been omitted.]

See also the Board's discussion of this quoted language and Member Schaumber's additional commentary in *Frye Electric, Inc.,* 352 NLRB 345, fn. 2 (2008).

Before commencing this analytical process, it is useful to review Martin's history at Sweet Brook. She was initially hired as a certified nursing assistant on April 10, 2002. She was on maternity leave for an 8-week period in 2003 and for a similar period in 2005. In her annual evaluation for that year, she met every performance standard except in the area of absenteeism. The evaluator noted that, "Elise is a great worker." (R. Exh. 27, p. 2.) The report cited her need to improve her attendance record but praised her as "a great person [who] cares about the residents." (R. Exh. 27, p. 2.)

In June 2005, Martin resigned from Sweet Brook in order to accept employment as a private duty nursing assistant for an elderly lady. This job ended 6 months later when that person died. Martin then contacted Denault, Sweet Brook's director of human resources. As Martin described in uncontroverted testimony, "I told her that I wanted to come back and that was it . . . . She said, you're back on the schedule and I started work." (Tr. 86.) One year later, Martin was terminated for excessive absenteeism. She testified that her termination for this cause was due to her medical condition consisting of torn ligaments in her knee. As a consequence, she filed for unemployment benefits. Sweet Brook contested the issue, contending that Martin had been discharged for cause. Martin prevailed. Approximately a week later, Denault telephoned her and, "asked me if I would like to come back to Sweet Brook." (Tr. 90.) She accepted this offer and resumed her employment in October 2006.[46] Indeed, the offer of employment included a $2500 hiring bonus that Martin received. Moresi testified that the purpose of this type of bonus payment was to encourage "longevity of the employee." (Tr. 1041.)

In March 2007, Martin took a 3-week maternity leave. She returned to work during the following month and was continuously employed by Sweet Brook thereafter until management refused to permit her to withdraw her resignation almost exactly 2 years later. During those 2

[46] Moresi confirmed these events, reporting that she objected to Denault's decision to rehire Martin. As Moresi described, "I told her [Denault] that, again, she'd been come and gone in the past and we're going to let her come back again?" (Tr. 930.) To which Denault responded, "she wants to come back and I'm going to take her back." (Tr. 930.)

years, she received the usual annual competency evaluations. The December 2007 evaluation rated her as meeting expectations in every category except absenteeism. It noted that Martin needed to "[w]ork on absenteeism." (GC Exh. 15, p. 12.) Thereafter, Martin received a verbal warning for absences, followed by a first written warning.

On December 4, 2008, Martin received what proved to be her final competency evaluation. Interestingly, it contained her best annual ratings since her original hire date. She was rated on 39 separate job categories and was listed as meeting the Employer's standards in every one of them. The evaluation form explains that such a rating means that the employee, "[p]erforms skillfully on the standard [and r]equires normal amount of supervision." (GC Exh. 10, p. 1.) Of particular significance to this case, Martin received this rated level of performance in the area of absenteeism. This represented an improvement from her performance in this area as reflected on prior annual evaluations. The rating form was signed by Assistant Director of Nursing Whitney on January 7, 2009, a mere 3 months prior to management's decision to refuse to let her remain on the staff.[47]

At approximately the same time, Whitney prepared another evaluation of Martin's performance. Overall, Whitney characterized Martin as "a competent employee, which has a firm grasp of her job expectations. She is able to assist in orientation of new employees and helping them to be a positive member of the team here at Sweet Brook." (R. Exh. 5.) The only cautionary note in this assessment was that Martin's attendance record required close monitoring. As predicted by Whitney, Martin did continue to struggle with the attendance issue. She received a verbal warning as to this in February. That verbal admonition also informed her that if she had two additional absences prior to the next October, she would receive a first written warning. Two months later, she decided to accept the job offer from Compassionate Care. Immediately thereafter, she learned that she was expecting another child and sought permission to remain at Sweet Brook because of its superior maternity benefits.

With this background in mind, it is necessary to apply the *Wright Line* methodology. At the first step in that assessment process, there can be no doubt that Martin was a prominent supporter of the Union's organizational campaign. She served on the Union's organizing committee, attended union meetings, distributed union literature throughout the Employer's premises, and discussed the Union with her coworkers. The degree of her union sympathies can best be gauged by recalling that she authorized the Union to feature her photograph and comments in its flyer announcing the filing of its representation petition. I readily find that Martin engaged in a course of protected conduct through her active participation in the Union's attempt to organize the work force.

Similarly, the evidence is clear that the Employer was well aware of Martin's union activities and sympathies. This knowledge included awareness of Martin's photograph and prounion commentary on the Union's election petition announcement. Apart from the clear evidence that union literature routinely came to the attention of management, Moresi testified that she "probably" saw the flyer with Martin's picture on it. (Tr. 963.) In addition, Carmain testified that she observed Unit Manager Card pick up one of the same flyers from a nurses' station. She also reported that she saw other supervisors in possession of union literature, including Assistant Director of Nursing Whitney. Of course, Card's knowledge of Martin's union

[47] In a praiseworthy example of candor, counsel for the Employer concedes that, apart from the issue of attendance, Martin's competency evaluations were "commendable." (R. Br., at p. 62.) As I have noted, the most recent such evaluation also showed satisfactory performance in that previously troublesome area of attendance.

activities is also established by her inclusion of Martin's name on the list of union supporters that Card e-mailed to Gancarz on Sticker Day. It also follows that Gancarz' knowledge of Martin's attitude is demonstrated by the receipt of that e-mail. Gancarz also testified that she was aware that Martin had been specifically named in the unfair labor practice charge regarding the distribution policy. Furthermore, Moresi chose to interrogate Martin regarding this unfair labor practice charge in which she was named. Finally, it will be recalled that Dix admonished Martin regarding which she considered to be Martin's improper distribution of union literature.[48] The evidence clearly establishes that knowledge of Martin's strong union sympathies was widespread among the ranks of management, including awareness at the highest levels.

At the third analytical step, it must be shown that the employee suffered an adverse action. Typically, this issue requires little discussion. In this case, however, it must be the subject of at least some brief commentary. It is undisputed that Martin was not discharged by her employer. Instead, the action taken against her was the decision to refuse her request to rescind her letter of resignation. Despite this distinction, it is clear to me that the Employer's decision represented an adverse action for purposes of the *Wright Line* analysis. The direct result of the refusal to allow rescission of the resignation was Martin's loss of further employment at Sweet Brook. As another administrative law judge has observed, "[L]oss of employment [is] frequently referred to as the 'capital punishment' of the workplace." *Reno Hilton,* 320 NLRB 197, 209 (1995). More pertinently, the Board has addressed the identical question in *Merrow Machine Co.,* 337 NLRB 421 (2002). In that case, it characterized the issue as, "whether the Respondent's refusal to allow [an employee] to rescind her subsequent voluntary quit was unlawfully motivated. In resolving this issue, we find that the judge correctly analyzed the case under *Wright Line*." 337 NLRB at fn. 1. [Citation omitted.] Implicit in this holding is the conclusion that a refusal to allow the retraction of a voluntary resignation constitutes an adverse action.[49]

Having found that Martin engaged in protected activities that were known to her employer and that the Employer took adverse action against her, I must next assess the crucial issue of motivation. In evaluating whether the adverse action taken against Martin was substantially motivated by unlawful animus against her union sympathies and activities, it is necessary to undertake a comprehensive and wide ranging examination of the context surrounding the refusal to allow her to retract her resignation. The Board has long recognized that direct evidence of unlawful animus may be difficult to obtain. As a result, "[i]t is well established that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required." *Tubular Corp.of*

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[48] Martin testified that she had not engaged in the particular conduct that prompted the admonition from Dix. This is immaterial because the Board will find the element of knowledge where the Employer suspects or assumes that the employee engaged in prounion conduct. See, *Martech MDI,* 331 NLRB 487, 488 (2000), enf. 6 Fed. Appx. 14 (D.C. Cir. 2001).

[49] Over the years, the Board has found unlawful discrimination arising from employers' refusals to permit revocation of resignations on a number of occasions. See: *Charles Batchelder Co.,* 250 NLRB 89, 90—91 (1980), enf. denied in pertinent part, 646 F. 2d 33 (2d Cir. 1981); *EDP Medical Computer Systems,* 284 NLRB 1232, 1276 (1987); *Southwire Co. v. NLRB,* 820 F. 2d 453 (D.C. Cir. 1987); *Aero Industries,* 314 NLRB 741 (1994); and *Star Trek, the Experience,* 334 NLRB 246, 247—248 (2001). In several of these cases, the Board has taken note that a distinguishing feature of such situations could be a defense that the employer has already hired a replacement for the worker who tendered the resignation. In this case, there is absolutely no contention that Sweet Brook had secured a replacement to fill Martin's vacancy.

America, 337 NLRB 99 (2001). [Citations omitted.]

Examining the events involved in this case, I find that a broad and compelling variety of circumstantial evidence supports a conclusion that the adverse action taken against Martin was substantially, if not completely, motivated by animus against her involvement with the Union's organizing campaign. Naturally, the starting point for an assessment of the Employer's state of mind must be the findings I have already made regarding the Employer's behavior during the organizing campaign. I have concluded that the General Counsel has proven that management unlawfully implemented a no-solicitation policy, promulgated an overbroad distribution policy, engaged in unlawful surveillance and in the creation of an impression of surveillance, conducted improper interrogations, and made statements that constituted implied threats against employees due to their union activities. These unfair labor practices constitute clear and persuasive evidence of management's willingness to violate the Act in order to frustrate the Union's organizing campaign. As such, they represent powerful evidence of unlawful animus. See, *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 204 (2007), enf. 519 F. 3d 373 (7th Cir. 2008) (animus established by pattern of unfair labor practices, including overbroad applications of no-solicitation and distribution policies and threats of reprisal).

The Employer's unfair labor practices go beyond the demonstration of a generalized attitude of animus against union supporters. It will be recalled that Martin was the direct subject of the announcement of the overly broad distribution policy by Dix. She was also the target of the unlawful interrogation and implicit threats made by Moresi in response to Martin's name being contained in the Union's unfair labor practice charge arising from the promulgation of that unlawful distribution policy. Finally, Martin was among the employees unlawfully subject to intimidation by Card in response to Sticker Day. These unfair labor practices that directly targeted Martin in the weeks preceding the refusal to permit her to withdraw her resignation are highly probative of a specific discriminatory mindset directed toward her particular situation. See, *Waste Management of Arizona,* 345 NLRB 1339, 1341 (2005) (inference of animus appropriate when discharged employee had been "the specific target of two contemporaneous unfair labor practices").

Apart from the clear evidence of animus against employees who supported the Union's campaign and specific animus against Martin for her involvement in that campaign, I find that the particular circumstances involved in the Employer's decision-making process and the manner in which it chose to explain that decision to Martin are highly revealing. In the first instance, it is worth noting the Employer's own policy regarding termination of employment. In its handbook, it advises the staff that:

> Involuntary termination occurs when Sweet Brook initiates termination of a staff member's employment. Usually, though not necessarily, this occurs following progressive discipline for performance or conduct problems that are severe or continuing in nature.

(GC Exh. 7, p. 30.) Quite logically, the Employer notes that termination is normally the result of "performance or conduct problems."

Interestingly, the record of management's deliberations regarding Martin's situation and the statements made to Martin in explanation of management's ultimate decision demonstrate that the adverse action against her did not flow from any such performance or conduct issues. Instead, it is clear that it was a product of management's dissatisfaction with her attitude. As Moresi put it in her e-mail to Gancarz recommending refusal of Martin's request to remain

employed, the key factor was management's "trying to [c]hange the environment here." (GC Exh. 28.) This was echoed by Gancarz in her testimony about the decision-making process. She explained that she decided not to permit Martin to remain on staff, "based on the culture change that we needed with Employees in the building." (Tr. 1140.)

Shortly after the decision was made, Dix met with Martin in order to convey the result and to articulate management's reasoning underlying the decision to deny her request to remain on the staff. Dix's explanation underscores the central importance of attitude as opposed to performance or conduct deficiencies. In Moresi's account of that meeting, Dix explains to Martin that the basis for refusing continuing employment to her was the fact that she was "unhappy" in her work. (Tr. 937.) In Martin's version of the conversation, Dix told her that the reason for the adverse decision was that, "[Y]ou hated your job enough to put in your notice, we're not going to take you back." (Tr. 251.) Under either version, it is evident that the reason for management's decision was a negative opinion of Martin's attitude rather than any misconduct or poor performance of her job duties.[50] Indeed, given Martin's recent competency evaluation indicating that she had performed satisfactorily in every area of assessment, it would have been surprising if management had chosen to cite a performance or conduct issue in support of the decision to deny Martin's request to remain employed at Sweet Brook.

The Board has a long history of understandable skepticism regarding employers' justifications of discharges based on assessment of the terminated employee's attitude, particularly when such justifications come within the context of a union organizing campaign. Given the wonderful breadth of vocabulary in the English language, those justifications are expressed in many guises similar to this employer's concerns about "environment," "culture," and the perception that the individual employee was "unhappy" in her job. Thus, the Board found animus where an employer justified discharge because the employee was a "disruptive force in the workforce." *Skyline Lodge,* 305 NLRB 1097, fn. 1 (1992), enf. 983 F. 2d 1068 (6th Cir. 1992). Similarly, in *James Julian Inc. of Delaware,* 325 NLRB 1109 (1998), the Board rejected the explanation that the former employee was not rehired due to his "attitude." In so doing, it underscored that, "[t]he Board has repeatedly found, with court approval, that, in a labor-relations context, company complaints about a 'bad attitude' are often euphemisms for prounion sentiments." Id. at 1109. In *Boddy Construction Co.,* 338 NLRB 1083 (2003), the rejected formulation was that the discharged employee was an "instigator." In *United Parcel Service*, 340 NLRB 776 (2003), the unsuccessfully proffered justification was that the discharged employee was a "troublemaker." Finally, in yet another case where the asserted reason for discharge was simply put as the employee's "attitude," the Board found animus and noted that "[i]t is well settled that an employer's reference to an employee's 'attitude' can be a disguised reference to the employee's protected concerted activity." *Rock Valley Trucking Co.,* 350 NLRB 69 (2007). [51]

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[50] It is significant that the uncontroverted evidence establishes that during their meeting Dix never raised any performance or conduct issue as forming part of management's rationale for denying Martin's request. The Board treats the failure to inform the employee that misconduct is the basis for action being taken against them as a factor adverse to an employer's defense. See *Corrections Corp. of America*, 354 NLRB No. 105 (2009), slip op. at 4, citing *Yellow Ambulance Service*, 342 NLRB 804, 805 (2004).

[51] It is also noteworthy that the Board does not hesitate to find violations of Sec. 8(a)(1) when an employer observes to an employee that he or she appears to be unhappy with their job and should seek other employment. See *Paper Mart,* 319 NLRB 9 (1995); *Hialeah Hospital,* 343 NLRB 391 (2004); and *Jupiter Medical Center,* 346 NLRB 650 (2006). If such utterances, in and of themselves, constitute unlawful threats and coercion, adverse action taken against an

Continued

Apart from the general aura of suspiciousness arising from an adverse action taken against a prounion employee in the midst of an organizing campaign and premised entirely on a perception of that employee's attitude rather than performance or conduct issues, there are other aspects of the decision-making process in this case that strike me as highly probative of a discriminatory motivation. It is uncontroverted that the Employer's first reaction to news of Martin's intended departure was utterly inconsistent with the eventual refusal to allow her to remain. Martin presented her letter of resignation to Wendy Kelly, a supervisory employee. Later that day, the two had their first opportunity to discuss the matter. Kelly asked Martin, "what she could do to get me to stay." (Tr. 240.) Martin responded by suggesting a pay raise. Kelly ruefully replied that, "I wish I could do that." (Tr. 240.) This initial response by a line supervisor to Martin's stated intention to leave Sweet Brook stands in stark and unexplained contrast to the eventual position taken by top management. Kelly's spontaneous reaction to the news of Martin's planned departure is probative evidence regarding management's true attitude toward Martin's conduct and performance at the institution.

Another troubling and unexplained oddity involved in the manner of Martin's departure from Sweet Brook concerns the deviation from normal procedure involved in the decision-making process. Moresi testified that she expected that the decision whether to grant Martin's request to rescind her resignation would be made by Dix. As Moresi clearly explained, "[I]t was ultimately Cindy's decision. She was Elise's supervisor or manager. She's the director of nursing, at that time. It was ultimately her decision." (Tr. 919.)

Despite this definitive statement regarding the chain of command, the evidence reveals that Dix did not make the decision or even participate in the process in any way. While Moresi raised the matter in an e-mail addressed to Dix and Gancarz (with a copy to Kelly), Dix was never given a chance to offer an opinion. A mere 2 minutes after receiving the e-mail, Gancarz sent a reply instructing Moresi and Dix to refuse Martin's request. The fact that the decision to end a longtime staff member's employment was made outside the normal lines of authority and at the highest level of management is indicative of something other than the routine and impartial operation of the personnel process. The extraordinary nature of the decision-making process, coupled with the startling and unseemly haste involved in reaching a determination, suggests something much more personal at work here. I find these unusual circumstances to be probative evidence of unlawful animus directed against Martin.

Lastly, I was also struck by the tone and content of Dix's conversation with Martin regarding the matter. Under either version of that event, Dix's comments were peculiarly personal and unprofessional. According to Martin, Dix told her that she was being denied permission to remain employed because she "hated" her job. (Tr. 251.) This resembles something approaching a schoolyard taunt rather than a calm and objective explanation of a personnel action. It reeks of animus. Under Moresi's version of the same conversation, a similar conclusion must be reached. According to this account, Dix began by confirming that Martin sought to revoke her resignation. She continued:

> I don't really think that's a good idea, you have decided to put in your resignation and you're unhappy; sometimes, it's okay to leave the job that you're in and you might find a different position that's better for you, so we're not going to let you take your resignation back.

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employee based on such sentiments is clearly an even more serious violation of the Act.

(Tr. 937.) This explanation drips with condescension and borders on sarcasm. It is certainly the rare employer who couches the decision to end the employment relationship as one designed to benefit the soon-to-be-former employee. Under either version of Dix's statements, it is hardly surprising that Martin burst into tears and fled. The inappropriate tone and content of the explanation for the refusal to grant Martin's request is further evidence of a personal and discriminatory animus directed against her.

I have found that the Employer's pattern of unlawful reactions to the organizing campaign and peculiar method of responding to Martin's request to revoke her resignation are strongly indicative of a discriminatory intent underlying the treatment of Martin. I will now evaluate management's stated reasons for deciding not to retain her services to see if those reasons support a finding of animus or demonstrate that the decision was based on a lawful and nondiscriminatory rationale. The Board has specifically authorized this approach of assessing the Employer's stated rationale when deciding whether animus is present, observing that:

> [I]t is well settled that, where an employer's stated motive is found to be false, an inference may be drawn that the true motive is an unlawful one that the employer seeks to conceal. [Citations omitted.]

Key Food, 336 NLRB 111, 114 (2001).[52]

In examining this employer's asserted rationales, I must begin by noting that they have shifted over time. The contemporaneous documentary evidence and the undisputed testimony regarding the meeting at which the Employer's decision was announced to Martin clearly establish that the original stated rationale was that Martin's attitude toward her work (i.e., the fact that she was "unhappy" and "hated" her job) was the basis for concluding that she would not be allowed to revoke her resignation. By the time of trial, this reasoning was no longer asserted to be the determinative factor. Instead, the newly articulated rationales were described by Gancarz as follows:

> The basis of my decision was based on Elise's history of absenteeism and resigning and returning and leaving and returning. Also based on Sharon [Moresi] and my and Cindy's [Dix] goal to improve employee retention and be more diligent in hiring processes and having Employees who are committed to the facility. I thought that based on Elise's history she wasn't really an Employee that would meet our expectations.

(Tr. 1144.) Moresi elaborated on this explanation by reporting that the decision to preclude

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[52] It is interesting to note that the Supreme Court has strongly endorsed this methodology in the context of a statute prohibiting age discrimination. As the Court stated, "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive . . . . [O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147 (2000). [Citations omitted.]

further employment for Martin was part of a newly devised revamp of the Employer's hiring and retention practices. As she explained,

> We wanted to change the environment of the revolving door and that's why we put in place the new hiring process, because we wanted to look at the whole picture, past performances that people applied when they left Sweet Brook and when they reapplied to come back to Sweet Brook. We looked at every aspect of their whole file, their performance, their absenteeism, how they worked, how they got along with coworkers.

(Tr. 931—932.)

In assessing this newly announced set of rationales, the starting point is the Board's longstanding belief that, "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." *Sound One Corp.,* 317 NLRB 854, 858 (1995) [Citation omitted.] Indeed, the Board has variously described such behavior by employers as "grasping for reasons" and "simply making up its defense as it went along." *Meaden Screw Products Co.,* 336 NLRB 298, 302 (2001) and *Desert Toyota,* 346 NLRB 118, 120 (2005), rev. denied 265 Fed. Appx. 547 (9th Cir. 2008). [Citations omitted from both quotations.] I conclude that this description readily applies to the rationales now being asserted in this case.

The Employer's current explanation for declining to permit Martin to remain employed consists of two parts. First, it contends that it had just implemented a new set of hiring and retention procedures. Under those new procedures, Martin would not qualify for retention. Second, the refusal to permit Martin to revoke her resignation was justified due to Martin's record of absenteeism.

In examining the alleged revision of personnel policies, apart from representing a new and different rationale from that given to Martin at the time of her denial of further employment, I conclude that this explanation is simply a pretext created to justify unlawful discrimination. It rests heavily on a contention that the Employer had recently changed its longstanding practices regarding hiring and retention in such a way as to require that Martin's request be denied. There is simply no credible evidence to support this assertion. To begin with, it is undisputed that Sweet Brook's historical policy regarding reemployment was to encourage experienced and competent staff to remain employed or to return to employment after prior departures. For example, Wilton provided uncontroverted testimony that there "was always an open door policy, as long as I was there" regarding the rehire of former employees. (Tr. 572.) She added that management was "very open to taking people back, very open." (Tr. 573.) Wilton also reported that management never announced any change in this policy.

Wilton's testimony is strongly corroborated by the Employer's handbook. For example, the edition in effect during this period provides that "[f]ormer staff members who are rehired within three months of their termination date will maintain previous seniority as of the last date of termination." (GC Exh. 7, p. 19.) Similarly, the handbook also provides:

> If Sweet Brook is unable to grant leave requests, staff members have the option of resigning and reapplying when they are ready to work. If reinstated within three months of termination date, they

> may regain seniority and certain benefits eligibility.[53]

(GC Exh. 7, p. 62.) It is apparent that these handbook provisions are designed to encourage veteran former staff members to reapply by giving successful reapplicants seniority and benefit privileges.[54] As such, they reflect a common sense policy articulated long ago by Judge Learned Hand, who explained that "seasoned men are better than green hands."[55] *NLRB v. Remington Rand*, 94 F. 2d 862 (2d Cir. 1938), cert. denied 304 U.S. 590 (1938). It is a noteworthy feature of this litigation that Sweet Brook chose to depart from this logical, preexisting employment practice in the case of Martin.

Although the evidence demonstrates that the Employer had a venerable policy designed to encourage the retention and return to employment of experienced staff members, Moresi contended that it was her plan to alter that policy. She testified that, upon assuming the position of director of human resources in December 2008, she embarked on a revision of hiring practices to improve the quality of the staff. For instance, she drafted position descriptions and developed a plan to have current employees participate in hiring interviews. She further contended that part of her plan was to tighten policies regarding reemployment so as to prevent employees from engaging in a pattern of resignations and reapplications. While I credit her account regarding the revision of hiring procedures, I reject her attempt to sweep rehiring policies into this new plan. In the first place, there is absolutely nothing in the way of documentary evidence to support such a claim.[56] To the contrary, Moresi's proposed handbook revisions retain all of the existing incentives for rehire. More importantly, Moresi's claim was directly contradicted by Gancarz. She testified that,

> We [Gancarz and Moresi] talked about retention rewards and those kinds of things. We had a discussion about it but we didn't move forward with anything other than the hiring, the participation and the hiring and interview process.

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[53] Of course, I recognize that the handbook policies encouraging former employees to reapply are not strictly applicable to Martin's situation as she was a current employee at the time of her request to revoke her resignation. Nevertheless, as counsel for the Respondent conceded in his position statement, "While they do not apply strictly to the case of the withdrawal of a resignation, the Handbook provisions concerning Rehire are relevant and describe the factors that Sweet Brook will consider in such cases as well." (GC Exh. 25, p. 6.)

[54] It is also interesting to note that the revised handbook that had not yet been finally approved by management retained the same provisions designed to encourage former employees to reapply. (Compare: GC Exh. 7 and GC Exh. 34.) This strongly undercuts Moresi's claim that Sweet Brook intended to change its practices in this area.

[55] In fact, it could be readily argued that this concept applies even more in the health care field. Judge Hand was referring to a company that manufactured office equipment. Undoubtedly, a manufacturer would normally prefer experienced machine operators, even though the manufacturing process is industrial and impersonal. Such a preference makes even more sense in the case of certified nursing assistants, employees who provide highly personal care to aged and infirm residents. Clearly, it would be advantageous to retain the services of a competent nursing assistant who knows the particular needs of the individual residents and has an established relationship with those residents. This is confirmed by counsel for the Employer's assertion that nursing assistants are the "backbone" of the institution due to the crucial role they fulfill in "responding to resident needs and requests." (R. Br. at p. 9.)

[56] This stands in contrast to the detailed materials submitted by the Employer documenting Moresi's changes in interviewing and hiring policies. See, for example, R. Exhs. 36 & 39.

(Tr. 1177.) As I have already indicated, Gancarz' account is entirely corroborated by the lack of revisions to the handbook on the subjects of "retention rewards and those kinds of things." I conclude that the contention that Martin's treatment was consistent with a newly implemented policy against rehire of former employees with a history of intermittent employment is simply a pretext manufactured in an attempt to explain the blatantly disparate treatment of Martin. This disparity of treatment is highlighted by comparison with the treatment afforded to a similarly situated coworker, Kelly Miller.

Miller was hired as a certified nursing assistant in July 2006. In April 2008, Miller submitted her resignation. Shortly thereafter, she experienced a change of heart and sought permission to revoke her resignation. Director of Nursing Dix granted this request and Miller remained employed. In common with Martin, Miller's personnel file reflects difficulties in complying with the Employer's attendance requirements. She received a string of verbal and written warnings for "excessive absences." (GC Exh. 14, p. 9.) In another similarity to Martin, Miller's most recent preceding competency evaluation showed her as performing satisfactorily in all areas. Unlike Martin, the evaluation contained an additional notation concerning her need to improve her attendance.

Miller testified that once the organizing campaign began she never spoke up on behalf of the Union and never informed management of her views about that issue.[57] In April, she was recruited by Compassionate Care and submitted her second resignation from Sweet Brook. She did advise the Employer that she would remain "willing to work per diem." (Tr. 71.) Both Miller and Moresi testified that Moresi told her that per diem work would not provide benefits. Moresi urged Miller to "think about it, and to come back to me and let me know her decision." (Tr. 992.) Miller testified that, a few days later, "I went in and told [Moresi] that I changed my mind and I would like to be put on the schedule to the full-time position and she said okay." (Tr. 75.) Tellingly, Gancarz testified that she did not recall any personal involvement in responding to Miller's request to rescind her resignation.

The Board has long held that "blatantly disparate treatment supports an inference of unlawful motivation." *Watkins Engineers & Constructors,* 333 NLRB 818 (2001). (Internal punctuation omitted.) Here, the evidence reveals that two nursing assistants with similar work histories attempted to revoke their resignations. The active union supporter was denied permission to do so, while the identical request from the employee who concealed her views about the Union was granted. Such conduct reeks of unlawful animus.[58]

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[57] Miller's contention that her union sympathies remained private is corroborated by the fact that Card did not list Miller among the many employees who wore prounion stickers on Sticker Day.

[58] The Employer attempts to rebut this evidence of disparate treatment by citing the circumstances of five former employees who were denied rehire by Sweet Brook. All of these cases are distinguishable. Applicant Clairmont had previously been discharged for unacceptable performance. Applicant Embry has a history of job abandonment and poor performance in such areas as quantity of work, teamwork, and attendance. Applicant Gretchner has a history of interpersonal problems during his prior employment at Sweet Brook and was given a poor reference from a subsequent employer due to concerns about patient care. Applicant Mongeon had been previously fired from Sweet Brook for both failing to report for work and failing to notify management that she was going to be absent. Finally, Applicant Shutters had a history of insubordination and problems with the level of her care of residents.

The final rationale cited by the Employer in support of its decision to deny Martin the further opportunity to work at Sweet Brook was concern about her record of absenteeism. This explanation comes perilously close to constituting an admission of unlawful discrimination. I say this because the Board holds that an Employer's conduct that is "inconsistent with its progressive discipline system" may be found to constitute probative evidence of unlawful animus. *Tubular Corp. of America,* 337 NLRB 99 (2001). For the reasons about to be discussed, it is obvious that this Employer engaged in precisely that form of discrimination.

To begin, it must be noted that the Employer has, in the words of counsel for the Union, "what is commonly referred to as a no-fault attendance policy."[59] (CP Br., at p. 21.) All of the testimony and documentary evidence are consistent in reflecting that the policy provides for a verbal notification after three absences for any cause. After six such absences, the employee is subject to a first written warning. After eight, this is followed by a second written warning. Upon accumulating ten absences, the employee may receive a third written warning or may be placed on probation or terminated from employment. The rigor of this policy is mitigated, however, by the fact that each employee's slate is wiped clean on every annual anniversary date. All employees, including Martin, were required to sign a form acknowledging that this was the Employer's disciplinary policy on the topic of attendance. (R. Exh. 2.)

Under the Employer's strict rules, an employee becomes liable to discharge for accumulating ten or more absences during a year of employment.[60] Had Martin accumulated such a quantity of absences, this case would resemble a typical dual motive discharge case. In other words, the factfinder would be required to grapple with the relative weight to be given to an employer's unlawful animus versus the employee's violation of a legitimate, preexisting attendance policy. What is so striking about this case is that there is absolutely no contention that Martin had accumulated the necessary absences to justify her termination under the Employer's rules. Indeed, the Employer introduced a complete compilation of Martin's entire record of absences over the period of her employment from October 2006 through April 2009. That document demonstrates that since the anniversary date of her hiring she had not accumulated 10 absences and was not eligible for termination.[61] Indeed, the Employer's own record reflects that she was "due" for a first written warning at the time she was denied permission to revoke her resignation. (R. Exh. 48.) This was further confirmed by Moresi, who agreed that Martin "was going to get a first written warning for the absence of March 30th and March 31st, '09." (Tr. 966.) Far from serving to justify the Employer's decision to deprive Martin of further opportunity to work at Sweet Brook, the attendance issue underscores the disparate and inconsistent treatment afforded to her.

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[59] The policy clearly warns employees that the reasons for any absences are irrelevant. For example, each employee is issued written notice that, "sick hours are accrued each month so that staff have paid time when ill but does not negate the absence policy," and that notes from a physician "may validate illness but does not excuse it" under the policy. (GC Exh. 14, p. 1.)

[60] The policy also permits termination if an employee receives four warnings in a 2-year period. Martin did not receive this level of discipline and was not eligible for termination under this provision.

[61] It is also worth noting that this record of absences does not in any way reflect an irresponsible pattern of behavior by Martin. Virtually every absence was caused by her illness or the illness or injury of her children. On only two occasions in over 2 years was an absence caused by any other issue. In both those cases, she was unable to work due to a lack of daycare. Of course, I recognize that the Employer's no-fault policy would not excuse any type of absence. Nevertheless, it is worthwhile to observe that Martin's record shows no pattern of abuse, merely the common problems of juggling work, health, and parenting.

Ordinarily, under *Wright Line,* once it has been shown that an employer possessed an unlawful motivation for taking adverse action against an employee, the burden shifts to permit the employer to attempt to demonstrate that it would have taken the same adverse action regardless of the existence of such animus. Nevertheless, the Board has explained:

> If, however, the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis.

SFO Good-Nite Inn, L.L.C., 352 NLRB 268, 269 (2008). That is precisely the situation here. As a consequence, the *Wright Line* analysis is complete.

Based on the totality of the evidence, I readily conclude that Martin was denied further employment because of her activities and sympathies in support of the Union and for the purpose of discouraging such activities and sympathies in her coworkers. This behavior constituted unlawful discrimination against her in violation of Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. The Employer promulgated an overbroad solicitation policy and announced that policy in response to the protected concerted activities of its employees in violation of Section 8(a)(1) of the Act.

2. The Employer announced an overbroad distribution policy and threatened to enforce that policy in a disparate manner in response to the protected concerted activities of its employees in violation of Section 8(a)(1) of the Act.

3. The Employer engaged in improper surveillance of its employees and created an improper impression of surveillance among its employees in violation of Section 8(a)(1) of the Act.

4. The Employer coercively interrogated its employees regarding their protected concerted activities in violation of Section 8(a)(1) of the Act.

5. The Employer impliedly threatened one of its employees due to her participation in protected concerted activities and with the intention of restraining, coercing, and intimidating its employees from exercising their Section 7 rights in violation of Section 8(a)(1) of the Act.

6. The Employer coerced and intimidated its employees from associating with an official of the Union in violation of Section 8(a)(1) of the Act.

7. The Employer engaged in unlawful discrimination against its employee, Elise Martin, by refusing to permit her to withdraw her resignation and continue her employment due to her union sympathies and activities in violation of Section 8(a)(3) and (1) of the Act.

8. The Employer did not violate the Act in any other manner alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I will recommend that it be ordered to rescind its unlawful solicitation and distribution policies and that it be required to post a notice in the usual manner.

With regard to the remedy for the Employer's unlawful discrimination against Martin, the customary measures include an order directing that she be offered reinstatement and restitution for the loss of pay and benefits from the date of the discrimination until the date of such offer of reinstatement. In this case, the Employer asserts two reasons that these remedies should not apply. The first contention is described by counsel for the Respondent as follows:

> Even if Martin's Section 7 rights may have been violated, reinstatement and/or backpay are improper because Sweet Brook could have legitimately terminated Martin at any time for "just cause"—i.e., chronic absenteeism.

(R. Br. at p. 78.)

The Board will not countenance such a claim. Its reasoning was well-explained in *Joseph Chevrolet, Inc.,* 343 NLRB 7, fn. 9 (2004), enf. 162 Fed. Appx. 541 (6th Cir. 2006):

> The Respondent argued that even if the discharge of [the employee] is found unlawful, it should not have to pay backpay because [that employee] was discharged "for cause." This argument is another attempt by the Respondent to assert its rebuttal defense under *Wright Line*, which we reject.

The Board's reasoning in *Joseph Chevrolet* is particularly applicable to this case since I have previously explained that the claim that Martin was denied further employment based on her record of absenteeism is entirely false. Beyond this, my analysis revealed that Martin had not engaged in any violation of the Employer's attendance policies sufficient to trigger such a disciplinary measure even if the Employer had been sincerely motivated.

The Employer's second argument bears more consideration. It asserts that Martin's behavior subsequent to her being told that she would not be allowed to remain at Sweet Brook constituted a degree of misconduct sufficient to preclude her further employment and to deprive her of the right to backpay. This argument is based on the Employer's characterization of Martin's behavior as described below:

> Martin not only failed to work out her two week notice period, she walked off the job with five hours remaining on her shift and then was a "no call—no show" for the next two days.

(R. Br., at p. 73.) The Employer views Martin's conduct as resulting in her having "abandoned her patients." (R. answer to complaint, GC Exh. 1(k), p. 5 and R. Br. at p. 4.)

The evidence shows that immediately after being told by Dix that she was not going to be allowed to remain at Sweet Brook because she hated her job Martin burst into tears and fled the meeting room. In my view, this was an entirely understandable, spontaneous, and sincere response to the act of discrimination to which she had just been subjected. Upon leaving the

room, Martin returned to her unit and spoke to Powers, her charge nurse. She explained what had happened and told Powers that, "I was leaving." (Tr. 143.) She also advised Powers that, "I have a couple of people left." (Tr. 143.) This was a reference to the fact that she had not completed all of the assignments for the residents on the unit. Martin and Powers hugged and Martin departed the facility. She failed to swipe out as she left. Although she had been scheduled to work on the following 2 days, she did not return to the facility.

While it is clear that Martin violated the Employer's policies by failing to swipe out upon leaving and by failing to report for work on the succeeding 2 days, I reject the contention that she abandoned her patients. Counsel for the Union asked Administrator Gancarz to describe the proper procedure in the event an employee planned to leave her shift early. Gancarz explained that, "[t]he process is to notify the Charge Nurse that you're leaving and the Charge Nurse would let the Manager know and the Scheduler." (Tr. 1191—1192.) This description of the proper procedure was corroborated by Melinda Gulotta who testified that an employee who needed to leave early would report to the charge nurse. With regard to any uncompleted patient care tasks, she reported that "generally we [the remaining employees] take care of it ourselves." (Tr. 523.) Thus, it is apparent that Martin followed expected procedures for early departure and her behavior did not constitute an abandonment of her patients.

Counsel for the Employer correctly notes that the Board will deny reinstatement and backpay to employees who engage in severe misconduct subsequent to the employer's act of discrimination against them. *Berkshire Farm Center,* 333 NLRB 367 (2001). Nevertheless, this principle must be balanced against another significant policy articulated by the Board as a reflection of the realities involved, given the likelihood of highly emotional responses by employees to acts of unlawful discrimination committed against them by their employers. The Fourth Circuit has described the Board's doctrine in the following manner:

> An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment. The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression. To accept the argument addressed to us by the company would be to provide employers a method of immunizing themselves from the only real sanction against violations of Section 8(a)(3). Reinstatement in the instant case is not, as the employer puts it, a reward to the employee for insurgency. Rather, as we see it, refusal to reinstate her would put a premium on the employer's misconduct.

NLRB v. M & B Hardware Co., 349 F. 2d 170, 174 (4th Cir. 1965).[62]

In my view, Martin's failure to swipe out and to report for work during the remaining 2 days of her notice period was both understandable and excusable. Her neglect in failing to swipe out was obviously a product of her distress at having just been subjected to unlawful discrimination. Her decision not to return to the facility is a reasonable response to the clear message from the Employer that she was no longer welcome at Sweet Brook due to her union sympathies and activities. The situation in which she was placed strikes me as fundamentally similar to that of the discriminatee in *Paradise Post,* 297 NLRB 876 (1990). In that case, in

[62] Relatively recently, the Board has cited the Fourth Circuit's opinion in that case with approval. See *Key Food,* 336 NLRB 111, 113 (2001).

reaction to an employer's provocation, an employee named Brown left work early and without permission. The Board rejected the employer's attempt to use this as a justification for denial of further employment, observing:

> As compared to the gravity of Respondent's wrongful provocation, Brown's reaction was quite mild and consisted of removing himself from the scene when he understandably became angered and frustrated over what the judge properly termed the Respondent's "brittle approach to the problem." The Board and the courts have found employee conduct more extreme than Brown's to be excusable under the provocation doctrine. [Citations omitted.]

Id. at fn. 2.

I conclude that Martin did not abandon her patients. While she did fail to follow the proper time and attendance documentation procedure when departing and did not return on the following 2 days, her violation of the Employer's rules was a direct and excusable response to the provocation caused by the Employer's unlawful discrimination against her. In consequence, I will recommend that the Employer be ordered to reinstate Martin and to reimburse her in the customary manner for the discrimination it committed against her. Thus, the Employer must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of the unlawful discrimination against her to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[63]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[64]

ORDER

The Respondent, Northern Berkshire Community Services, Inc. d/b/a Sweet Brook Transitional Care and Living Centers, Williamstown, Massachusetts, its officers, agents, successors, and assigns, shall

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[63] As has become a tiresome ritual, the General Counsel asks me to ignore longstanding Board precedent by ordering that interest on this award be compounded quarterly. On numerous prior occasions, I have expressed my concern about this litigation tactic of seeking such relief from administrative law judges who are clearly not authorized to grant it. For example, see *Frye Electric, Inc.,* 352 NLRB 345, 358 (2008). Nothing has changed. Given the current lack of a full complement of Board members, I think it fair to say that nothing can change. It is certainly clear that the Board continues to reject the General Counsel's position. See, *Quanta,* 355 NLRB No. 8, slip op. at 3, fn. 4 (2010), citing *Rogers Corp.,* 344 NLRB 504 (2005). Thus, it remains improper for me to consider the General Counsel's request for the seasons explained in *Frye.*

[64] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Promulgating, maintaining, or enforcing an overbroad policy against solicitation by employees and from promulgating or enforcing a policy against solicitation by employees in response to the protected concerted activities of its employees.

(b) Promulgating, maintaining, or enforcing an overbroad policy against distribution of literature by employees and from disparately enforcing its distribution policies in a manner designed to impair the Section 7 rights of its employees.

(c) Engaging in improper surveillance of the protected concerted activities of its employees and from creating an impression that it is engaging in such surveillance.

(d) Coercively interrogating its employees regarding their union sympathies or their participation in protected concerted activities or regarding the union sympathies or participation in protected concerted activities of other employees.

(e) Threatening, coercing, or intimidating its employees due to their union sympathies or their participation in protected concerted activities.

(f) Refusing to permit Elise Martin or any other of its employees, to withdraw their resignations because of their union sympathies or their participation in protected, concerted activities or in any other manner discriminating against them due to their union sympathies or their participation in protected concerted activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its overbroad work rule against all solicitation by employees on its premises, notify its employees that this rule has been rescinded, and remove all "NO SOLICITING" signs from the entry points to the building.

(b) Rescind its overbroad rule against distribution of union literature in all locations except employee breakrooms and notify its employees that this rule has been rescinded.

(c) Within 14 days from the date of the Board's Order, offer Elise Martin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Elise Martin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusal to permit Elise Martin to withdraw her resignation and the ensuing termination of her employment and, within 3 days thereafter, notify her in writing that this has been done and that the refusal to permit her to withdraw her resignation and the ensuing termination of her employment will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the

Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Williamstown, Massachusetts, copies of the attached notice marked "Appendix."[65] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 2009.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 9, 2010

_____
Paul Buxbaum
Administrative Law Judge

[65] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD-10-10
Williamstown, MA

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT promulgate, maintain, or enforce an overbroad policy against solicitation by our employees and WE WILL NOT promulgate or enforce a policy against solicitation by employees in response to their participation in protected union activities.

WE WILL NOT promulgate, maintain, or enforce an overbroad policy against distribution of literature by our employees and WE WILL NOT disparately enforce our distribution policies in a manner that impairs our employees' rights under Federal labor law.

WE WILL NOT engage in improper surveillance of our employees' union activities and WE WILL NOT create an impression among our employees that we are engaging in such surveillance.

WE WILL NOT coercively interrogate our employees about their union sympathies or their participation in union activities or about the union sympathies or the participation in union activities of other employees.

WE WILL NOT threaten, coerce, or intimidate our employees due to their union sympathies or their participation in union activities.

WE WILL NOT refuse to permit Elise Martin or any of our other employees to withdraw their resignations because of their union sympathies or their participation in union activities, and WE WILL NOT discriminate against our employees in any other manner due to their union sympathies or participation in union activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Federal labor law.

WE WILL rescind our overbroad work rule against all solicitation by employees on our premises, notify our employees that we have done so, and remove all "NO SOLICITING" signs from the entrances of our facility.

WE WILL rescind our overbroad rule against all distribution of union literature in places other than the employee breakrooms and notify our employees that we have done so.

WE WILL, within 14 days from the date of the Board's Order, offer Elise Martin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Elise Martin whole for any loss of earnings and other benefits resulting from the discriminatory refusal to permit her to continue her employment, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to permit Elise Martin to continue her employment, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the refusal to permit her to continue her employment will not be used against her in any way.

NORTHERN BERKSHIRE COMMUNITY SERVICES, INC. d/b/a SWEET BROOK TRANSITIONAL CARE AND LIVING CENTERS

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222–1072

Hours of Operation: 8:30 a.m. to 5 p.m.

617-565-6700.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.